

**Human Rights and the Environment in Prisons: a case study of
Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil,
before the Inter-American Commission on Human Rights**

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I dedicate this thesis to my family, my wife Alessandra, and my boys João and Pedro. Thank you for joining me and supporting me unconditionally in this journey of personal and professional enhancement during my master's degree program at Indiana University, Indianapolis, United States. Love you.

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ABSTRACT

Human rights and the Environment are in the process of an ongoing approximation that started in the 1972 Stockholm Declaration and had its heyday in 2018 when the Inter-American Court of Human Rights recognized an autonomous right to a healthy environment under the American Convention. The interdependence of both regimes shapes legal effects either of the civil and political rights or economic and social rights. Yet the ongoing approximation between the regime over the years, environmental rights are still neglected in prisons, even when hazards to the environment create poor conditions of detention, affecting life, health, dignity, and welfare of the inmates.

This thesis will address the topic of human rights and the environment in prisons, studying the case *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil, before the Inter-American Commission on Human Rights*. The study will focus on the differences of natures between human rights and environmental rights and their effects on the use of the machinery of the Inter-American system of protection of human rights.

The objective of this study is to propose a new interpretation of the international human rights documents in the Inter-American system based on the approximation of both regimes and to bring new perspectives to the issues of justiciability and enforceability of the environmental rights in prisons in the regional system.

Keywords: Human Rights, Environmental Rights, Conditions of Detention, Inter-American Commission of Human Rights, Porto Alegre Central Prison, Brazil.

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INTRODUCTION

International human rights and environmental regimes have born in different historical moments. The human rights regime was born after World War II as an answer from the recently created United Nations to the horrors of war. At that moment, the Universal Declaration of Human Rights was drafted to reflect the beliefs of the United Nations General Assembly regarding human rights. Its language evidenced “the hopes and idealism of a world released from the grip of the World War II.”¹ On the other hand, the environmental regime was born in the late 1960s, early 1970s, when the United Nations first gathered to analyze the human environment at the 1972 Stockholm Declaration,² that brought “principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.”³

Human rights and environmental rights regimes also showed differences in nature and goals. The human rights regime traditionally focus on the individual – even as part of a group – while the environmental theory focuses on collective rights, not necessarily relates to a specific individual,⁴ and even transcends generations.⁵ Yet the differences, the interconnection between both regimes became evident over the years, which reflected on the growing use of the human right machinery to solve environmental issues at the international or regional levels.⁶

¹ Alston, P. & Goodman, R., *International Human Rights: The Successor to International Human Rights in Context*, Oxford University Press 2013, p. 142.

² Galizzi, Paolo. From Stockholm to New York, via Rio and Johannesburg: has the environment lost its way on the global agenda?, *Fordham International Law Journal*, v. 29, p. 1002.

³ United Nations. Report of the United Nations Conference on the Human Environment, in Stockholm, 1972, available at <http://www.un-documents.net/aconf48-14r1.pdf>, last accessed on 14 April 2019.

⁴ See Engle, Eric. Universal Human Rights: A generational story, *Annual Survey of International & Comparative Law*, v. 12, p. 233. See also Sayto, Natso T. Colloquium Proceedings: Panel Three: Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in The United States, *University of Miami Inter-American Law Review*, v. 28, p. 389.

⁵ Cornescu, Adrian V. *The Generations of Human's rights. Days of Law: the Conference Proceedings*, Masaryk University, 1 ed., 2009, p. 6.

⁶ Atapattu, Sumudu. The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law, *Tulane Environmental Law Journal*, v. 16, p. 70.

Only in the late 1980s, the United Nations appointed the first special rapporteur on human rights and the environment, Ms. Fatma Zohra Ksentini, to research the connections between human rights and the environment.⁷ In 1994 the rapporteur affirmed the two-way relation of human rights and the environment stating that “[e]nvironmental damage has direct effects on the enjoyment of a series of human rights,”⁸ and also that “human rights violations in their turn damage the environment.”⁹

Even after 25 years of development, international bodies have been shy to recognize a right to a healthy environment. However, it did not “prevent[] the development of human rights norms relating to the environment... by ‘greening’ other human rights,”¹⁰ such as the right to life and health and applying them to environmental issues.¹¹ Only in 2017, taking a huge step to advance the interconnections between human rights and the environment, the Inter-American Court of Human Rights (IACourtHR) recognized an “autonomous right to a healthy environment under the American Convention” in the Advisory Opinion OC-23/17,¹² observing Article 11 of the Protocol of San Salvador.¹³ The IACourtHR’s understanding starts a new era in the development of the interdependence of both regimes, which will open additional doors for further studies in the near future.

The importance of understanding the interconnections between human rights and the environment can be seen when environmental rights advocates use the existent human rights machinery to redress for the environment. There is a “lack of enforcement

⁷ Popovic, Neil A.F., In pursuit of environmental human rights: commentary on the draft declaration of principles on human rights and the environment, *Columbia Human Rights Law Review*, v. 27, p. 490.

⁸ United Nations, Economic and Social Council, Review of further developments in fields with which the sub-commission has been concerned, Human rights and the environment, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9, p. 60, available at <https://undocs.org/ru/E/CN.4/Sub.2/1994/9>, last accessed on 14 April 2019. Quoted below as Ksentini Report.

⁹ *Id.* p. 61.

¹⁰ Knox, John H *et al.* *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, 290 pages, p. 2.

¹¹ *Id.*

¹² Inter-American Court of Human Rights. Advisory Opinion OC-23/17, November 15, 2017, Requested by the Republic of Colombia, available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf, last accessed on 20 October 2019.

¹³ Additional Protocol to the American Convention on Human Rights, Article 11, available at <http://www.oas.org/juridico/english/treaties/a-52.html>, last accessed on 14 April 2019.

machinery for environmental issues,”¹⁴ which is superseded by the adoption of the existing human rights protection systems with some success. Nevertheless, due to the difference of nature and goals between human rights and the environment, the existing human rights machinery is not completely adapted to provide the best remedy to environmental issues.¹⁵

Yet the ongoing approximation between human rights and the environment over the years, environmental rights are still neglected to some populations even when environmental hazards clearly affect human rights. Environmental hazards that create poor conditions of detention, for example, affect life, health, dignity, and welfare of the inmates, but they are frequently seen only as human rights issues. Besides, prisons, detention centers, and police stations are rarely related to the environment.

The thesis will study the case *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil*, before the Inter-American Commission on Human Rights (IACHR), where several environmental hazards gave rise to human rights violations in one of the worst prisons in Brazil. The case was filed in 2013 by associations of judges, prosecutors, public defenders, and others that gathered under the denomination Forum of the Penitentiary Issue¹⁶ expecting to solve environmental hazards that affect life, health, dignity, and welfare of the inmates. The IACHR accepted the case under the number 13.353 and granted the precautionary measures MC-08/13 in favor of the inmates.¹⁷

¹⁴ Atapattu, Sumudu. The Right to a Healthy Life *supra* note 6., p. 70.

¹⁵ *Id.*, p. 71.

¹⁶ The Forum of the Penitentiary Issue (“Fórum da Questão Penitenciária”) is formed by the Association of Judges of the State of Rio Grande do Sul; Rio Grande do Sul State Public Prosecution Association; Association of Public Defenders of the State of Rio Grande do Sul; Brazilian Bar Association, Rio Grande do Sul Subsection; Brazilian Institute of Engineering Assessment and Expertise – IBAPE; Regional Council of Engineering and Agronomy of Rio Grande do Sul; Community Council for Assisting Prisoners in Prison Houses of the Jurisdictions of the Criminal Execution Court and Sentencing Court and Alternative Measures of Porto Alegre; Regional Council of Medicine of the State of Rio Grande do Sul; Transdisciplinary Institute of Criminal Studies; Themis Legal Advice and Gender Studies; and UniRitter Human Rights Clinic.

¹⁷ Inter-American Commission on Human Rights, Resolution 14/2013, Precautionary Measure no. 8-13, available at [http://www.oas.org/en/iachr/decisions/pdf/Resolution14-13\(MC-8-13\).pdf](http://www.oas.org/en/iachr/decisions/pdf/Resolution14-13(MC-8-13).pdf), last accessed on 14 April 2019. In the decision, the Commission requests that the Government of Brazil: A. adopt the necessary measures to ensure the life and physical integrity of the persons deprived of their liberty at the Central Penitentiary of Porto Alegre; B. provide hygienic conditions and adequate medical treatment to the inmates in the facility, according to their respective clinical conditions; C. implement measures aimed at regaining secure control of all areas of the PCPA, following international human rights standards and safeguarding the lives and physical integrity of all inmates. In particular, ensure that the agents of the State security forces are responsible for the internal security functions and that inmates are not in charge of disciplinary, safety

The case *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil*, will ground the analysis of the effectivity of the Inter-American System of protection of human rights and the enforceability of its decisions within the members of the Organization of the American States. With this goal in mind, the thesis will present the actual state of the human rights protection in the Inter-American System and will study the benefits of the approximation between human rights and the environment to the issue *conditions of detention*.

The first chapter will raise awareness for the discussion of the issue *conditions of detention* under the risk society theory.¹⁸ The chapter will also support the idea that prisons are man-made environments, a concept mentioned in the 1972 Stockholm Declaration. Finally, it will identify environmental hazards in prisons in the US, in Brazil and worldwide, and it will also present the case of study.

The second chapter will evaluate the historical development of the legal framework of human rights, focusing on the rights of prisoners, and how some of those rights ended up achieving human rights status. Next, it will be described the birth of environmental protection and how human rights and the environment started their ongoing approximation to the point of the foundation of a new concept: environmental rights in prisons.

The third chapter will investigate the use of the Inter-American System in cases related to the *conditions of detention*. It will explain the main international documents that shape the regional human rights framework, focusing on the “dual-layer” system formed by the IACHR and the IACourtHR and the system of individual petitions. This peculiarity of the Inter-American System allows individuals, groups, or non-governmental organizations to directly file petitions appointing violations of provisions of the American Convention. The *condition of detention* is an issue frequently raised in the Inter-American System, though the discussion was never linked to the environment. The thesis will seek to identify the nature of the discussion – that vary from individual rights to collective environmental issues – and to study the appropriateness of the Inter-American System to redress for these situations. Finally, the third chapter will explore

or control functions; D. implement a contingency plan, make fire extinguishers and other necessary tools available; and E. take immediate action to substantially reduce overcrowding within the PCPA.

¹⁸ Beck, Ulrich. *Risk Society: Towards a New Modernity*, Sage Publication, 1992, 260 pages.

the founding documents and bodies of the Inter-American System of protection of human rights, as well as bring up cases related to the *conditions of detention* before the IACHR and the IACourtHR to understand the limitations of the system when dealing with this issue.

The fourth chapter will build upon the analysis of the previous chapter that the Inter-American System has been an effective mechanism to avoid violations of civil and political rights of individuals or groups of individuals, but the system is still struggling to become more effective when it deals with economic and social rights, and with collective rights. The thesis will examine the justiciability and enforceability of environmental rights in prisons in the Inter-American System; analyze the ways to enforce justiciability and enforceability grounded on the Brazilian environmental framework and the development of the IACourtHR's interpretations regarding the right to a healthy environment; propose the possibility of execution of the IACourtHR's decisions regarding environmental rights in Brazilian Courts; and, finally, state the advantages of using environmental strategies in prison conditions situations and for the case study.

The objective of this study is to propose a new interpretation of the international human rights documents in the Inter-American System based on the approximation of Human Rights and the Environment. Although it brings a unique perspective of dealing with human rights and environmental issues, this new interpretation is consistent with the understanding of the IACourtHR on matters related to economic and social rights, as well as to the right to a healthy environment. This thesis intends to bring new elements to the ongoing process of approximation of human rights and the environment, which reflects on the enforceability of the Inter-American System's decisions in environmental cases – in general – and in cases of *conditions of detention* – in specific.

CHAPTER ONE: ENVIRONMENTAL HAZARDS IN PRISONS

Conditions of detention in Latin American, and particularly in Brazil, have been concerning specialists for years, yet the issue generally does not attract much attention to civil society, and governments normally do not allocate enough resources to solve the problems. Hathazy¹⁹ points out that the crises of detention in Latin American is manifested “most clearly in the overpopulation of the region’s prison systems, deficient infrastructure, and prison violence, [and it] is mostly related to, on the one hand, disastrous human rights conditions inside Latin American prisons, and on the other, the political denial of these conditions.”²⁰

Conditions of detention are invariably addressed at national and regional levels as violations of criminal execution rules or human rights violations. Although deficient infrastructure, overcrowding, poor sanitation, inadequate access to food, or water²¹ characterize the surroundings that inmates are subjected to, these issues are not connected environmental harms because prisons are not commonly related to the environment, and the topic is outshined by criminal or human rights aspects.

This first chapter seeks (1) to draw attention to the importance of the subject for the society; (2) to identify prisons as places subjects to environmental concern; (3) to bring up examples of environmental harms in prisons in the United States, worldwide, and in Brazil; and (4) to present the case study *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil*.

1.1. The conditions of detention under a risk society

Why should society about prisoners, prisons, jails, their conditions? Why should governments spend public money to redress issues in prisons while there are not enough resources to apply to relevant matters, such as the educational system, public health, and infrastructure? Why be concerned with such a specific problem that is related only to who

¹⁹ Hathazy, Paul. The crisis of detention and the politics of denial in Latin America, *International Review of the Red Cross*, v. 98, n. 903 December 2016, pp. 889-916.

²⁰ *Id.*

²¹ United States. Department of State, Report on International Prison Conditions, available at <https://www.state.gov/documents/organization/210160.pdf>, last accessed on 14 April 2019.

committed a crime and deserves to stay behind bars? Wouldn't it be better to hide any possible problem behind the high walls of the prisons? Do not inmates deserve to suffer as a retribution to the crimes they committed? Should specialists, governments, and civil society care?

If your answer to the last question is no, you are probably grounded in the social dynamics with the logic of the "class positions," the typical division of the "industrial society," product of the modernity.²² If your answer is yes, you are probably using a new reflexive way of evaluating modernity, based on "risk positions," where the hazards of a specific human activity are not restricted to the affected individuals, but they are distributed to the whole nature, facing no limits spatially and temporally.²³ Those concepts are evoked by Ulrich Beck when he forged the theory of risk society.

Beck builds upon a new reflexive way of balancing the production of wealth and its side-effects, leading the conclusion that the world is continually moving away from the idea of a classical industrial society, based on the production and distribution of wealth, and moving towards a society based on the distribution of "risks,"²⁴ as acceptable side-effects of modernity. Thus, we – as a society – accept some risks in the name of the modernity and the development of new technologies, such as the significant annual rate of deaths in traffic, pollution emissions from vehicles, the need to build roads in green areas, all of that to provide us with the ability to move from a place to another comfortably and faster. However, unlike the logic of the classical industrial society – where the benefits of the new technologies are contrasted with mere calculable, visible, concrete and localized dangers – today we tend to be unceasingly more conscious of the integration between nature and society and of the globalized consequences of the human activities, transforming "threats to nature...into economic, social, and political contradictions and conflicts."²⁵

Thus, having Beck's risk society as the theoretical basis to this study, and answering the questions proposed above, it is possible to say that specialist, society and

²² Beck, Ulrich. Risk Society: Towards a New Modernity, *supra* note 18, p. 3.

²³ *Id.*, p. 2.

²⁴ *Id.*, p. 20.

²⁵ *Id.*, p. 80.

governments should care about prisoners, prisons, jails, and their conditions. Since nature and society are not opposed concepts, and since the conditions that inmates experience behind prisons' walls will end up having economic, social, and political consequences in society²⁶ – as will be discussed below – this is an issue to worry about.

While writing this chapter, recurrent problems related to the chaos of the Brazilian prison system are reaching the pages of the newspaper around the world: (1) In May 2019, CNN reported “55 inmates killed in spate of prison riots in Brazil;”²⁷ (2) In April 2019, an article from Reuters reported overcrowding and sanitary issues in Central Prison, Porto Alegre, Brazil, and recalled another riot in Manaus prisons in 2017 that killed another 56 inmates;²⁸ (3) Also in April, 2019, Zero Hora Newspaper reported that prisoners were kept handcuffed, sleeping in sitting position and eating with their hands in police cars for days while waiting for a place in any prison in the State of the Rio Grande do Sul, Brazil.²⁹ All of these facts could happen without being noticed by the majority of the population. Although “some people are more affected than others by the distribution...of risks,”³⁰ such as the vulnerable population, those facts invariably affect the rest of the society, in a “*boomerang effect*,”³¹ since we are experiencing some aspects of a risk society.

The lack of state control of the prisons makes “[i]nmates create extralegal governance institutions when official governance is insufficient,”³² and opens space for the gang control of the system with consequences in the criminality outside prisons' walls. Skarbek states that in Brazil, “[p]rison gangs undermine the official operation of a facility, increase recidivism, and have substantial influence on the streets.”³³ Gangs fight within

²⁶ *Id.*, p. 25.

²⁷ CNN, <https://www.cnn.com/2019/05/27/americas/brazil-prison-deaths-intl/index.html>, last accessed on 31 May 2019.

²⁸ Reuters, <https://af.reuters.com/article/worldNews/idAFKCN1RM1B0>, last accessed on 31 May 2019.

²⁹ Zero Hora, <https://gauchazh.clicrbs.com.br/seguranca/noticia/2019/04/presos-a-ceu-aberto-na-capital-quatro-dias-algemados-em-viaturas-dormindo-sentados-e-comendo-com-as-maos-cjpuuyfh01zp01p54cqam5q3.html>, last accessed on 31 May 2019.

³⁰ Beck, Ulrich. Risk Society: Towards a New Modernity, *supra* note 18, p. 23.

³¹ *Id.*, p. 23.

³² Skarbek, David. Covenants without the Sword? Comparing Prison Self-Governance Globally, *American Political Science Review*, v. 110, n. 4, November 2016, p. 845.

³³ *Id.*, p. 858.

prisons to rule the system. The culture of violence spreads not only among criminal gangs but also among their community and, finally, step-by-step to the whole country. Crime rates increase. Cars thefts and drug trafficking are a means to finance gangs. Drugs proliferate among society. People are hijacked. Properties need to be fenced. Sanitary issues and poor conditions spread diseases among inmates, prison workers, and visitors, which end up reaching communities nearby and the rest of the population. The health system becomes overwhelmed and demands even more public resources that will be drained from investments in schools, road maintenance, and other social services.

In a risk society, threats and their consequences are incalculable³⁴ and frequently demand more than one approach to be completely identified. The use of one branch of science is not enough to propose good answers to certain issues, such as *conditions of detention*. In the next chapters, this study will propose a different approach to the issue *conditions of detention*, not only focusing on criminal and human rights aspects but also taking into consideration environmental elements involved in the problem.

1.2. Prison as a man-made environment

Having the risk society in mind, how could this discussion be related to prison conditions on the grounds of environmental law? Is environmental law not supposed to deal only with nature, such as flora, fauna, water resources, air, pollution, and green-related issues? Or could we include man-made environments as the subject of concern of the environmental law?

The first necessary step to understand what is subject to the protection of environmental law is the concept of environment. The commonplace when one tries to understand the meaning of environment is to relate it to the “natural world,”³⁵ or “the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival.”³⁶ This natural concept relates the environment to the complex of factors

³⁴ Beck, Ulrich. Risk Society: Towards a New Modernity, *supra* note 18, p. 24.

³⁵ Oxford Dictionary, Definition of the environment, available at <https://en.oxforddictionaries.com/definition/environment>, last accessed on 14 April 2019.

³⁶ Merriam-Webster Dictionary, Definition of the environment, available at <https://www.merriam-webster.com/dictionary/environment>, last accessed on 14 April 2019.

received from nature. Maybe, that is one of the reasons that most people don't make the necessary association between prisons and the environment, which makes scholars as Sharp define environment "as anything that is not man-made."³⁷

However – still limited to the definition in the dictionaries – the environment can be understood as "the circumstances, objects, or conditions by which one is surrounded."³⁸ This shorter definition, paradoxically, makes its concept broader. The environment, then, would not be limited to the "natural world,"³⁹ but it would include the "human activities which modify the natural environment in order to provide what they need for living,"⁴⁰ such as the example of the urban areas, with its streets, public spaces, houses, buildings and – by logical corollary – prisons.

A broader definition of the environment is more in line with the risk society theory for considering society and nature as non-opposing concepts.⁴¹ Human beings are part of nature, and every action that interferes with nature, therefore, also interferes with human beings. Human interventions in nature are also part of the environment, such as man-made environments.

In International Law, the idea of the natural and man-made environment has already appeared in the Report of the United Nations Conference on the Human Environment, in Stockholm, 1972. The document states that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and the enjoyment of basic human rights-even the right to life itself."⁴² So, according to the understanding at the time, natural and man-made are the two aspects of the environment.

³⁷ Sharp, Walter G. The effective deterrence of environmental damage during armed conflict: a case analysis of the Persian Gulf War, *Military Law Review*, v. 137, p. 1.

³⁸ Merrian-Webster Dictionary, *supra* note 36.

³⁹ Oxford Dictionary, *supra* note 35.

⁴⁰ Bawole, Paulus, Harmony with Nature for Sustainable Built Environment, Man Made and Natural Environment, available at https://www.irbnet.de/daten/iconda/CIB_DC22849.pdf, last accessed on 14 April 2019.

⁴¹ Beck, Ulrich. Risk Society: Towards a New Modernity, *supra* note 18, p. 80.

⁴² United Nations. Report of the United Nations Conference on the Human Environment, *supra* note 3.

The United Nations Stockholm Conference is a product of the dawn of modern environmentalism, in a post-World-War II scenery, a time of real concern with the welfare of human beings and apprehension with the future of humankind. Almost at the same period, and reflecting the same trend, national Constitutions around the globe, started showing provisions related to environment protection. By 2008, “fifty-nine constitutions guarantee[d] a right to a healthy environment in some form, while over one hundred impose an obligation on governments to protect the environment.”⁴³ That is the case, for example, of the Brazilian Constitution that provides that “[e]veryone have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the government and the community shall have the duty to defend and preserve it for present and future generations.”⁴⁴ Besides, the Brazilian Constitution expressly mentions “environment” in several different provisions, related to the economic order⁴⁵, rural property⁴⁶, health and workplace⁴⁷, and social communication⁴⁸. Also, the cultural heritage is protected under article 216 of the Brazilian Constitution, which includes “urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value.”⁴⁹ Finally, without expressly mention the word environment, the Brazilian Constitution indirectly protects the artificial environment in its articles 182 and 183, referring to urban policies. These latter constitutional provisions are the base of the Brazilian City Statute, which states in the first article, the use of the urban property must observe the “environmental balance.”⁵⁰

⁴³ Lewis, Bridget, *Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection*, Macquarie Journal of International and Comparative Environmental Law, 2012, v. 8, p. 42.

⁴⁴ Brazil. Constitution of the Federative Republic of Brazil, Article 225, available at <http://english.tse.jus.br/arquivos/federal-constitution>, last accessed on 14 April 2019.

⁴⁵ *Id.*, Articles 170, VI; 174, § 3º; and 177, §4º, I, b.

⁴⁶ *Id.*, Article 186, II.

⁴⁷ *Id.*, Article 200, VIII.

⁴⁸ *Id.*, Article 220, § 3º, II

⁴⁹ *Id.*, Article 216, V.

⁵⁰ Brazil. Federal Law 10.257/2001, available at http://www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10257.htm, last accessed on 18 October 2019. In the implementation of urban policy, which are dealt with in arts. 182 and 183 of the Federal Constitution,

Those numerous provisions in the Brazilian Constitution prompted scholars to identify four aspects of the environment: natural, artificial, cultural and workplace environment. Yet Fiorillo⁵¹ asserts that the concept of environment is unitary, the author identifies its four aspects in order to facilitate the recognition of the harmful activity and the rights affected: (1) Natural environment that “consists of the atmosphere, the elements of the biosphere, the waters (including the territorial sea), the soil, the subsoil (including mineral resources), the fauna and flora;”⁵² (2) Artificial environment that “is the built urban space, consisting of the set of buildings...and by public facilities;”⁵³ (3) Cultural environment that is “integrated by the historical, artistic, archaeological, landscape, tourist heritage, which although artificial, as a rule, as a work of man, differs from the previous one (which is also cultural) by the sense of special value;”⁵⁴ and (4) Workplace environment, which is “the place where people perform their work, whose balance is based on the healthiness of the environment and the absence of agents that compromise the physical and mental health of workers.”⁵⁵

Maranhão⁵⁶ agrees with Fiorillo affirming that the Brazilian Constitution “embraced a broad conception of the environment, encompassing elements not only ecological but also social and cultural.”⁵⁷ Finally, the Brazilian Supreme Court adopted the four aspects identified by Fiorillo in the case *ADI 3540-MS/DF*, stating that “...the economic activity...is subordinated [to the principle] that privileges the “defense of the

the provisions of this Law shall be applied. Single paragraph. For all intents and purposes, this Law, called the City Statute, establishes rules of public order and social interest that regulate the use of the urban property for the collective good, security, and well-being of citizens, as well as environmental balance.

⁵¹ Fiorillo, Celso Antonio Pacheco. *Curso de direito ambiental brasileiro*, 14 ed., São Paulo, Saraiva, 2013.

⁵² *Id.*, p. 50.

⁵³ *Id.*, p. 50-51

⁵⁴ Silva, José Afonso da. *Direito Constitucional Ambiental*, São Paulo, Malheiros Ed., 1994, p. 54.

⁵⁵ Fiorillo, Celso Antonio Pacheco. *Curso de direito ambiental brasileiro*, *supra* note 51, p. 53.

⁵⁶ Maranhão, Ney, *Meio Ambiente: Descrição Jurídico-Conceitual*, Lex Doutrina, available at http://www.lex.com.br/doutrina_27301129_MEIO_AMBIENTE_DESCRICAO_JURIDICO_CONCEITUAL.aspx, last accessed on 14 April 2019.

⁵⁷ *Id.*

environment” (CF, art. 170, VI), which translates broad and comprehensive concept of the notion of natural, cultural, artificial and workplace environment.”⁵⁸

Although there are historical and cultural reasons to justify such specificities in the Brazilian legal system, the use of a binary definition of the environment (natural/man-made), such as the Stockholm Declaration of 1972, is adequate considering the international approach of this thesis. This binary definition considers the existence of the natural environment and, also, all other types of environment tailored by material or ideological human activity, which englobes either built environments, cultural environment, workplace environment, and any other classification that may be regionally appropriate.

Considering that prison facilities are a product of a human activity that modifies the natural environment to provide a place to keep the inmates separate from the rest of the community, they fit in the concept of the man-made environment. And, for this reason, the prison environment must be the object of protection as much as any other man-made environment, such as urban properties and public buildings.

Although Bradford points out eight different aspects (or dimensions) of the prison environment to be observed: “activity, emotional, feedback, freedom, privacy, safety, social, structure, and support,”⁵⁹ for this study, the focus will be the physical environment, that carries the aspects of structure, privacy, and safety. So, poor hygienic conditions, overcrowding, lack of space in the cells, and related issues, will be discussed ahead, as elements that can affect the welfare and impact the human rights of the prisoners, their families, prison workers, and nearby communities. Prison workers, for example, “are exposed to suffering and illness, especially by exposure to psychosocial risks resulting from tension and violence,...biological hazards by contact with communicable diseases,”⁶⁰ [as well as] poor infrastructure and unhealthy environment.

⁵⁸ Brazil. Federal Supreme Court. ADI 3540-MS/DF, 2005, at. 37, available at <http://www.stf.jus.br/imprensa/pdf/adi3540-MC.pdf>, last accessed on 17 October 2019.

⁵⁹ Bradford, Andrew R. An Examination of the Prison Environment: An Analysis of Inmate Concerns across Eight Environmental Dimensions, Electronic Theses and Dissertations. Paper 2216, 2006, p. 2, available at <http://dc.etsu.edu/etd/2216>, last accessed on 14 April 2019.

⁶⁰ Jaskowiak, C. R. and Fontana, R.T. The work in prison: reflections on the health of prison officers, *Revista Brasileira de Enfermagem*, 2015, 68(2), p. 216, available at <http://dx.doi.org/10.1590/0034-7167.2015680208i>.

So, observing prison as a man-made environment, the next chapter will bring examples of environmental hazards in prisons worldwide. Although the focus of this research is the case study of *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil* – which is included in Latin American reality – examples of environmental harms in prisons in the United States and other countries will be raised. It will help to build upon the theoretical grounds for the thesis, as well as to state the point that environmental hazards in prisons are not only an economic problem existent in developing countries, but it is also a matter of political choice.

1.3. Examples of environmental hazards in prisons

Historically, the physical conditions of the prisons have never been commonly known as adequate. Yet in 1777, the Sheriff of Bedford, England, John Howard, described the prisons in that country as places of suffering.

There are prisons, into which whoever looks will, at first sight of the people confined there, be convinced, that there is some great error in the management of them: the sallow meager countenances declare, without words, that they are very miserable. Many who went in healthy, are in a few months changed to emaciated dejected objects. Some are seen pining under diseases, ‘sick and in prison’ expiring on the floors, in loathsome cells, of pestilential fevers, and confluent smallpox: victims, I will not say to the cruelty but must say to the inattention, of sheriffs, and gentlemen in the commission of the peace.⁶¹

Howard mentioned the conditions of the prisons as the cause of the prisoners’ suffering, bringing up issues related to food, water, air, sewers, and bedding.⁶² Even after more than two centuries later, Flinn & Baker⁶³ still identified issues regarding the conditions of cells, overcrowding, sanitation, personal hygiene, and food in prisons in England in the 1990s.

Prison conditions are historically problematic, and it is not an exclusivity of England. As it will be discussed ahead, both in developed or in developing countries, this is an issue that must be addressed. However, the harsh surroundings of the facilities were

⁶¹ Howard, John. *The State of the Prisons in England and Wales*, W. Eyres, 1780, p. 5.

⁶² *Id.*, pp. 5-10

⁶³ Flynn, N. and Baker, N. *Introduction to prisons and imprisonment*, 1998, pp. 84-87, available at <http://ebookcentral.proquest.com>, created from iupui-ebooks on 2019-02-09 10:50:09.

not usually understood as environmental issues. Even after the birth of the Environmental movement in the late 1960s, it took some time for governments and organizations to look at prisons as locations deserving environmental attention.

In the United States, as another example of a developed country, several environmental hazards have been identified in prison units from coast to coast. The Human Rights Defense Center identified some of those hazards in the 2016 letter addressed to the Deputy Associate Assistant Administrator of the Environmental Justice in the attempt to include the prison's issues in the EJ 2020 Agenda: (1) flooding in Louisiana and Florida; (2) chemical spill in West Virginia; (3) nuclear threat in New York; (4) toxic waste landfill site in New York; (5) coal ash dump in Pennsylvania; (6) water quality problems related to the mining and processing of uranium in Colorado; (7) drought and increased temperatures in California; (8) arsenic in prison water supplies in Texas and California; (9) lead in prison water supplies in Michigan and Wisconsin; (10) prisons built on military Superfund site in California; and (11) water contamination in prisons nationwide.⁶⁴

Rakia states that the perils of environmental conditions such as crumbling infrastructure, flooding and raining threats, excessive heat, and polluted air, taking the case of Rikers Island prison in New York as an example: "Rikers is built on a landfill. The ground underneath the facilities is unstable, and the decomposing garbage emits poisonous methane gas. In addition to extreme heat and poor air quality, flooding and crumbling infrastructure pose a serious threat, especially when superstorms like Hurricane Sandy strike."⁶⁵

⁶⁴ Prison Legal News website. Human Rights Defense Center letter to the Deputy Associate Assistant Administrator for Environmental Justice, available at <https://www.prisonlegalnews.org/media/publications/EJ%202020%20letter%20to%20EPA%20HRDC%20Updated%20comment%207-28-16%20with%20Cover%20Letter%202.pdf>, last accessed on 04 November 2019.

⁶⁵ Rakia, Raven. A sinking jail: The environmental disaster that is Rikers Island, 2016, available at <https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island/>, last accessed on 14 April 2019.

Holt focus on the issue of heat, which is aggravated by the overcrowding [b]ecause human beings are sources of heat and humidity, [and] the number of people in a given enclosed space has a direct impact on the thermal conditions in that space.”⁶⁶

Armstrong⁶⁷ points out several environmental hazards focusing in death rows in Louisiana, such as (1) indoor air pollution, like smoke, chemicals, and mold; (2) water pollution, like rust and contaminated drinking water; (3) hazardous waste, such as sewage and wastewater; and (4) lead exposure.

Even the Environmental Protection Agency (EPA) observed that “[p]otential environmental hazards at federal prisons are associated with various operations such as heating and cooling, wastewater treatment, hazardous waste, and trash disposal, asbestos management, drinking water supply, pesticide use, and vehicle maintenance.”⁶⁸

The above examples of environmental hazards in American prisons are replicated in prisons worldwide and Brazil. The above cases and examples cited in this part don’t exhaust environmental hazards in prisons in the United States, but they provide an initial idea of the kind of hurdles prisons in developing countries face considering the capacity of investment are not up to par to the largest economy in the world.⁶⁹

Beyond the issues in the American prisons, the United States State Department recognized “a serious challenge facing governments worldwide: ensuring those in detention and incarceration are treated humanely in environments that are safe and secure.”⁷⁰ Note that the 2013 report mentions the “environment”, stating concerns related to prison conditions, such as “overcrowding, poor sanitation, [and] inadequate access to

⁶⁶ Holt, Daniel W. E. Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change, Sabin Center for Climate Change Law, Columbia Law School, 2015, available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf, last accessed on 14 April 2019.

⁶⁷ Armstrong, Andrea C. Death Row Conditions Through an Environmental Justice Lens, *Arkansas Law Review*, v. 70, pp. 217-219, quoting Donna Heron, Federal Prisons to Get Environmental Checks, EPA, July 24, 2007, available at <https://scholarworks.uark.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1011&context=alr>, last accessed 14 April 2019.

⁶⁸ *Id.*, p. 207.

⁶⁹ The United States 2018 Gross Domestic Product was 20.494 trillion dollars while the Brazilian reached only 1,868 trillion dollars. See World Bank Website, available at <https://databank.worldbank.org/data/download/GDP.pdf>, last accessed on 28 October 2019.

⁷⁰ United States. Department of State, Report on International Prison Conditions, *supra* note 21.

food or potable drinking water,”⁷¹ in countries such as Ukraine, Eritrea, Sri Lanka, Serbia, Chad, Bangladesh, Venezuela, South Sudan, Haiti, Benin, Lebanon, Brazil, Ethiopia, Mexico, Italy, Ireland, Belgium, and France.

Brazil is one of the 25 countries mentioned by the U.S. State Department, “whose governments receive United States assistance [and] raise serious human rights or humanitarian concerns.”⁷² The largest South American country raises attention due to the increase of the prison population – that increased eight times from 1990 to 2006⁷³ – combined with the scarcity of governmental funding for the maintenance of the facilities. At a visit to three facilities in the State of Paraná, Darke noticed that “[a]ll three were severely overcrowded, and none had any natural light.”⁷⁴ And, in one of those prisons, “68 men were held underground a cellar. Water stains covered the walls, and puddles had formed on the floor. Electric lights hung loosely from the ceiling.”⁷⁵ Acebes⁷⁶ remarked that “[h]istorians of medieval times would recognize much in Brazil’s modern-day prisons. Detainees are often held in dark, humid, and poorly ventilated cells”. Also, mentioning an on-site visit in the complex of Curado, in Recife, the author stated that he “entered a cell containing 60 men that had only six cement bunks. Because there was not enough floor space for the men to lie down, they had put up a web of hammocks. The cell smelled overwhelmingly of feces, sweat, and mold.”⁷⁷

The conditions, as mentioned above, are commonplace in Brazilian prisons, particularly in large urban centers, in which the overcrowding, the lack of government

⁷¹ *Id.*

⁷² *Id.*

⁷³ Brazil. Ministry of Justice, DEPEN, Departamento Penitenciário Nacional, Levantamento Nacional de Informações Penitenciária, 2016, available at http://depen.gov.br/DEPEN/noticias-1/noticias/infopen-levantamento-nacional-de-informacoes-penitenciarias-2016/relatorio_2016_22111.pdf, last accessed on 28 October 2019.

⁷⁴ Darke, Sacha. *Conviviality and Survival*, Palgrave Studies in Prisons and Penology, 2018, p. 45, available at https://doi.org/10.1007/978-3-319-92210-2_2, last accessed on 14 April 2019.

⁷⁵ *Id.*, p. 46.

⁷⁶ Acebes, Cezar M., Brazil’s correctional houses of horror, *Foreign Affairs*, 2017, available at <https://www.foreignaffairs.com/articles/brazil/2017-01-18/brazil-s-correctional-houses-horror>, last accessed 14 April 2019.

⁷⁷ *Id.*

control by the action of criminal gangs, and the scarcity of resources are circumstances that expose prisoners to a harsh environment. Skarbek⁷⁸ states that

[i]n Brazil, the amount and quality of resources provided through official means is extremely limited. Inmates often have little access to health care, food, and shelter.... Severe overcrowding is widespread. Inmates lack clean water, soap, and showers. A recent report found that a quarter of facilities did not have mattresses for all inmates, and about two-thirds of prisons did not have hot water or towels and toiletries.... Prisons are poorly built and in decay.

Those are the conditions that almost five thousand prisoners face in their criminal execution and prison staff face in their workplace on a daily basis.

1.4. *Persons Deprived of Liberty in Porto Alegre Central Prison, Brazil.*

Porto Alegre Central Prison (“Presídio Central de Porto Alegre” – actually named “Cadeia Publica de Porto Alegre”) is located Southern Brazil, and it was considered the worst prison in the country by a legislative committee in 2008.⁷⁹ This fact prompted the birth of the *Forum of the Penitentiary Issue*⁸⁰ to file a petition⁸¹ in the IACHR regarding violation of human rights, which took the number 13.353. A significant part of the reasoning described environmental issues, yet it was not addressed directly as the inobservance of environmental rules, but only regarding human rights violations.⁸² After the Brazilian government’s first response, the IACHR granted precautionary measures to the persons deprived of liberty in the facility.⁸³

⁷⁸ Skarbek, David. *Covenants without the Sword?*, *supra* note 32, p. 849.

⁷⁹ Brazil. Câmara dos Deputados, CPI do sistema carcerário, 2008, p. 488, available at <https://www.conjur.com.br/dl/relatorio-cpi-sistema-carcerario.pdf>, Last accessed 14 April 2019.

⁸⁰ See *supra* note 16.

⁸¹ AJURIS website, Petition in case #13.353 in the IACHR, available at <http://www.ajuris.org.br/sitenovo/wp-content/uploads/2016/06/representacao-pcpa-oea-2013.pdf>, last accessed on 14 April 2019.

⁸² Organization of the American States website. Inter-American Commission on Human Rights Petition and Case System, Informational Brochure, 2010, p. 6, available at https://www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf, last accessed on 30 October 2019. A petition in the Inter-American System must “allege violations of the human rights guaranteed in the American Declaration of the Rights and Duties of Man (“the American Declaration”), the American Convention on Human Rights (“the American Convention”), and other inter-American human rights treaties.”

⁸³ Inter-American Commission on Human Rights, Resolution 14/2013, Precautionary Measure no. 8-13, *supra* note 17.

The environmental issues raised in the petition were based upon on-site visits by the members of the Forum of the Penitentiary Issue, as well as interviews with detainees, with authorities, and photographic documentation. Also, Brazilian Engineering Appraisal and Expertise Institute of Rio Grande do Sul delivered a building inspection report analyzing five topics: (1) reinforced concrete structures; (2) sealing and masonry; (3) electrical installations; (4) hydro sanitary installations; (5) firefighting.⁸⁴ The petition addresses those issues but adds some information regarding the (6) overcrowding, (7) kitchens and food, (8) hygienic conditions, and (9) temperature, also bringing in the human aspects prison conditions.⁸⁵

According to the petition,⁸⁶ Central Prison was inaugurated in 1959 with individual cells without bathrooms, that were later transformed “in a collective cell with eight cement beds and the center, a bathroom was improvised,”⁸⁷ that ended up accommodating forty inmates. The overcrowding is the most visible issue of the prison, and it reinforces environmental problems because the poor infrastructure is overloaded with the use of so many people. Prisoners sleep outside their cells, on the floor of the galleries, with no adequate space. Some “improvise ‘aerial beds,’ made of cloth and plastic,”⁸⁸ to face the lack of space and the cold temperatures of the floor.

With the population almost exceeding three times its original capacity, issues with the sanitary facilities were and are widespread. Prisoners install plastic bags on the ceiling and use plastic bottles as hoses to avoid sewage from upper toilets to fall over their beds.⁸⁹ This procedure leads the sewage to fall into the inner courtyard, where “feces, urine, remains of food, dirt, rats, and cockroaches [share the space with prisoners], their children, their wives, and visitors.”⁹⁰

⁸⁴ AJURIS website, *supra* note 81.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, p. 10. See Annex I.

⁸⁸ *Id.*, p. 11. See Annex II.

⁸⁹ *Id.*, p. 11. See Annex III.

⁹⁰ *Id.*, p. 13. See Annexes IV and V.

The kitchen can serve only 1,500 inmates, and inmates prepare the food using “the rubbish sewer running on the ground.”⁹¹ This situation stimulates the remaining prisoners to use improvised electric stoves in the cells, powered by clandestine electrical connections, in which are added “televisions, radios, showers, water heaters, etc., resulting in high risk of fire, as well as energy overload.”⁹²

Finally, the temperature of the building is not controlled by any mechanism, but the ones improvised by the inmates, such as fans for the Summer and electric heaters for the Winter.⁹³ As affirmed in the petition, temperatures in Porto Alegre vary from around 32 Fahrenheit in the Winter to easily more than 95 degrees in the Summer; this becomes a threat to the prisoners’ health.⁹⁴

The factors described above are environmental hazards found in Porto Alegre Central Prison that all together constitute “the circumstances, objects, or conditions by which [inmates, prison workers, and families are] surrounded,”⁹⁵ or their physical environment. And it is aggravated by the fact that prisoners are an “involuntary displaced population,”⁹⁶ with minimum possibility of changing their surroundings.

The following table compiles the information of the plaintiffs’ petition at the IACHR and the building technical report stating the environmental hazards by topics:

⁹¹ *Id.*, p. 15. See Annex VI.

⁹² *Id.*, p. 14. See Annex VII.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Merriam-Webster Dictionary, *supra* note 36.

⁹⁶ Behnke, Nikki *et al.* Improving environmental conditions for involuntarily displaced populations: water, sanitation, and hygiene in orphanages, prisons, and refugee and IDP settlements. Journal of Water Sanitation and Hygiene for Development, 2018, 10.2166/washdev.2018.019, available at https://www.researchgate.net/publication/326163553_Improving_environmental_conditions_for_involuntarily_displaced_populations_water_sanitation_and_hygiene_in_orphanages_prisons_and_refugee_and_IDP_settlements., last accessed on 14 Apr 2019.

Table 1. Environmental hazards at Porto Alegre Central Prison

Topics	Environmental Hazards
REINFORCED CONCRETE STRUCTURES	<ul style="list-style-type: none"> • Lower reinforcement frames segregation and exposure, with insufficient covering and in hardware corrosion process; • Cracking on galleries mezzanine slabs, showing evidence of water infiltration from the cells' bathrooms; • Evidence of water infiltration through pavilions' expansion joints; • Generalized sanitary facilities are leaking, causing concrete degradation and reinforcement corrosion.
SEALING AND MASONRY	<ul style="list-style-type: none"> • Evidence of water infiltration, leaking, humidity stains, fungi, and mold, with widespread degradation of plaster coatings and painting finishes of masonry elevations in galleries and cells; • Detachment and disaggregation of floor ceramic tiles and masonry elevations of the galleries' bathrooms, with sealing and waterproofing failures at the cells' wet areas.
ELECTRICAL INSTALLATIONS	<ul style="list-style-type: none"> • Apparent electrical networks, with uninsulated seams and precarious extensions; complete disregard of technical regulations regarding the design aspects and shock and electrical short-circuit safety installations.
HYDROSANITARY FACILITIES	<ul style="list-style-type: none"> • Inexistence of sewerage system in the cells bathrooms (private) and galleries (collective), with no drain box, with rudimentary mending through plastic bottles; • Sewage from cells' and galleries' bathrooms drained directly into the patios, running on the walls and open-air ditches in the patios; • Evidence of precarious repairs on PVC water pipes in the cell bathrooms' hydraulic extensions.
FIREFIGHTING	<ul style="list-style-type: none"> • There is no fire prevention program, and even if it were proposed, it would not have conditions to be approved by the competent public authority, once it does not comply with the law due to prison overcrowding, electrical network precariousness, no escape routes with unobstructed emergency exits.
OVERCROWDING	<ul style="list-style-type: none"> • The current occupation is approximately 4,591 prisoners, although the official capacity is 1,984 prisoners. • The cells were assembled, so that four individual cells gave way to a collective cell with eight cement beds with an improvised center a bathroom; • In the galleries initially built for a hundred prisoners, there are around 470 people; • In the absence of beds, prisoners are forced to sleep on the floor in mattresses foam or to improvise "aerial beds," made of cloth and plastic.

KITCHEN AND FOOD	<ul style="list-style-type: none"> • The kitchen is built to serve 1,500 inmates, although the prison population is way over 4,500 prisoners. • The proliferation of “handmade” kitchens around the cells • The food is prepared by the inmates, and it is served in inappropriate paneling in the same courtyards used by the prisoners and its visitors.
HYGIENIC CONDITIONS	<ul style="list-style-type: none"> • Sewage fall into the inner courtyard, and prisoners adapt ditches and use blankets to contain the human feces; • There are feces, urine, remains of food, dirt, rats, and cockroaches in the inner courtyard, where prisoners receive their children, their wives, and visitors and have meals; • Prisoners must perform the meals with their hands and plastic bags; • Inmates are deprived of hygienic material staff and clothing; nor are they provided with blankets, bedding, and towels
TEMPERATURE	<ul style="list-style-type: none"> • Temperatures vary from around 0 Celsius [32 Fahrenheit] in the winter to easily more than 35 Celsius [95 Fahrenheit] in the summer, without any heating or cooling systems.

Source: AJURIS website. Petition in case #13.353 in the IACHR, *supra* note 81, quoting the Brazilian Engineering Appraisal and Expertise Institute of Rio Grande do Sul IBAPE/RS Building Inspection Report.

Although those numerous environmental hazards, the petition does not raise any specific information about water, soil, and air contamination, neither if the inmates are subject to any level of chemical exposure, which is different from some examples of American prisons.⁹⁷ It does not necessarily mean that these issues do not exist – which is quite unlikely considering the risks found – but that the right of information concerning environmental hazards is probably being violated in this case. According to Principle 10 of the Rio Declaration, “each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.”⁹⁸

Environmental hazards at Central Prison described above not only affects the inmates but also, employees, families, and population nearby. Jacobi reinforces that “[t]he failure of prisons to properly treat prisoners with infectious diseases or sexually transmitted diseases endangers not only the prisoner, his fellow prisoners, and the staff,

⁹⁷ Prison Legal News website, *supra* note 64.

⁹⁸ Rio Declaration on Environment and Development, Principle 10, available at <http://www.un-documents.net/rio-dec.htm>, last accessed on 14 April 2019.

but also the broader community to which the prisoner returns when he is released.”⁹⁹ This statement is consistent with Beck’s risk society theory, which affirms that even “things which are substantively-objectively, spatially and temporally disparate are drawn together casually and thus brought into a social and legal context of responsibility.”¹⁰⁰ Society should not ignore this issue because, ultimately, it will affect everyone in a manner that is not entirely known. The risks in a “risk society” might, most of the time, be invisible, not measurable by traditional science, but it does not mean that they do not exist. Besides, the lack of information by the authorities hides the gravity of the situation, either by the extension of the known hazards or by the likelihood of the existence of other environmental issues such as water, soil and air contamination or chemical exposure. In Brazil and developing countries, information systems are not fully efficient, which makes the uncertainty about environmental hazards a reality to work with.

Yet the unknown hazards, the environment described at Central Prison is enough source of direct violations of international standards of human rights and environmental rules. Those standards will be explained in the next chapter, not only in a descriptive manner, but they will be related in order to better explain their development over the years. The treatment of prisoners, human rights, and the environment are constantly evolving concepts, and a historical analysis of the legal framework is helpful to make us understand their current meaning and to project their future format as well.

⁹⁹ Jacobi, John V., Prison Health Public Health: Obligations and Opportunities, *American Journal of Law & Medicine*, v. 31, p. 466.

¹⁰⁰ Beck, Ulrich. Risk Society: Towards a New Modernity, *supra* note 18, p. 28.

CHAPTER TWO. HUMAN RIGHTS AND THE ENVIRONMENT: THE DEVELOPMENT OF THE LEGAL FRAMEWORK

In this chapter, it will be analyzed how prisoner's rights develop over the years and how some of those rights ended up obtaining human rights status. At the same time, it will be described the birth of environmental protection and how human rights and the environment started their growing interrelation to the point of the foundations of a new concept: environmental rights in prisons.

2.1. The existing international standards for the rights of prisoners, human rights, and environmental rights

The standards regarding the topic of this study were not created simultaneously, but they were product of years of historical development starting with the first rules about the rights of prisoners in the late XVII century. Adopted for constitutions of the new nations worldwide in centuries XVIII and XIX, they also served as grounds to international human rights provisions and international standards for the treatment of prisoners in the XX Century. On the other hand, environmental rules are relatively new, remounting to the late 1960s, with the birth of the environmental regime. Finally, the studies relating human rights and the environment started to strengthen only in the 1990s, but it still permits some development specifically regarding the environment in prisons.

2.1.1. Rights of prisoners and human rights

The first rule regarding the treatment of prisoners goes back to the English Bill of Rights,¹⁰¹ in 1689, determining that “no[] cruel and unusual punishments [should be] inflicted,” in a first attempt to limit the power of the king after the Glorious Revolution of 1688 “that overthrew King James II of England...and installed... William III...and his wife, Mary II, as England's new king and queen.”¹⁰² This document influenced the

¹⁰¹ English Bill of Rights, available at <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/data.pdf>, last accessed on 14 April 2019.

¹⁰² Bessler, John D. The Concept of “Unusual Punishments” in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual, *Northwestern Journal of Law and Social Policy*, v. 13, p. 308.

American Bill of Rights that repeated the same text in the Eighth Amendment, ratified in 1791,¹⁰³ with the intent to limit the power of the newly created central government.

The English and the American Bill of Rights influenced constitutions worldwide, such as the “French, German, Japanese, and South African constitutions”¹⁰⁴ and, also, international rules. However, it was only in 1948 that the United Nations first wrote the provision in the Universal Declaration of Human Rights, stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁰⁵ Although the Universal Declaration of Human Rights is not a formal treaty, with binding powers, this document expands the concept of the ancient Bill of Rights and details the values of the United Nations Charter, serving as “the constitution of the entire regime, as well as the single most cited human rights instrument,”¹⁰⁶ which made its standards influence international law and modern constitutions enacted after World War II.

Grounded on the principles of its Charter and the Universal Declaration, and specifying the rule that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,”¹⁰⁷ the United Nations adopted, in 1955, the Standard Minimum Rules for the Treatment of Prisoners setting the “essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.”¹⁰⁸ Those standards encompass rules regarding accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, contact with the outside world, religion, treatment, work, etc., making more concrete the principle of the Universal Declaration. These standards were

¹⁰³ American Bill of Rights. Eighth Amendment, available at <https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf>, last accessed on 14 April 2019.

¹⁰⁴ Calabresi, S. & Silverman, B. Hayek and the citation of foreign law: a response to Professor Jeremy Waldron, *Michigan State Law Review*, v. 1, pp. 123-124, 2015.

¹⁰⁵ Universal Declaration of Human Rights, available at <http://www.un.org/en/universal-declaration-human-rights/>, last accessed on 14 April 2019.

¹⁰⁶ Alston, P. & Goodman, R., *International Human Rights*, *supra* note 1, p. 142.

¹⁰⁷ Universal Declaration of Human Rights, *supra* note 105.

¹⁰⁸ Standard Minimum Rules for the Treatment of Prisoners, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf, last accessed on 14 April 2019.

updated in 2015 by the adoption of the General Assembly Resolution 70/175, the Nelson Mandela Rules.¹⁰⁹

The 1969 American Convention on Human Rights made an essential enlargement of the rule of the Universal Declaration in its Article 5, naming it “The Right to Humane Treatment.”¹¹⁰ For the first time, an international document mentions the need to respect the “physical, mental, and moral integrity.”¹¹¹ The Convention reaffirms the Universal Declaration statement that “[n]o one [should] be subjected to torture or to cruel, inhuman, or degrading punishment or treatment,”¹¹² but adds the specific need to observe the “inherent dignity of the human person”¹¹³ for “[a]ll persons deprived of their liberty.”¹¹⁴ It also states the principle of personal responsibility by affirming that “[p]unishment shall not be extended to any person other than the criminal.”¹¹⁵ And, in the paragraphs 4, 5, and 6 the American Convention expands the rules regarding the separation of convicted and non-convicted persons, the treatment of minors, and the need to observe “reform and social readaptation of the prisoners.”¹¹⁶

There was a clear expansion of the idea of prisoners’ rights in international law since 1689. The American Convention innovated and expanded the concepts stated at the English Bill of Rights, in the Eighth Amendment, and the in Universal Declaration to introduce new human rights to be opposed by “[a]ll persons deprived of their liberty”¹¹⁷ to the members of the Organization of the American States in an international document with binding power.

¹⁰⁹ Nelson Mandela Rules, United Nations General Assembly Resolution 70/175, available at <https://undocs.org/A/RES/70/175>, last accessed on 14 April 2019.

¹¹⁰ American Convention on Human Rights, Article 5, available at <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>, last accessed on 17 August 2019.

¹¹¹ *Id.*, Article 5.1.

¹¹² *Id.*, Article 5.2.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*, Article 5.3.

¹¹⁶ *Id.*, Articles 5.4, 5.5, and 5.6.

¹¹⁷ *Id.*, Article 5.2.

2.1.2. Environmental Rights

Different from the rights of prisoners that go back to the XVII century, environment protection became a concern to the United Nations only in the early 1970s when an international agenda emerged with the Stockholm Declaration, “the first U.N. gathering to examine the state of the human environment.”¹¹⁸ The document declared “principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.”¹¹⁹ Since Stockholm, the “global awareness of environmental issues increased dramatically, as did international environmental law-making proper,”¹²⁰ paving the growth of environmental discussions around the globe.

Rio Declaration came about twenty years after Stockholm, in 1992, reaffirming the principles stated in the first declaration, and with the task to “systematiz[e] and restat[e] existing normative expectations regarding the environment, as well as of boldly posit[] the legal and political underpinnings of sustainable development.”¹²¹ Both declarations, Stockholm and Rio, although they are not binding documents, encompassed principles that either were customary law at the time of their creation or became customary law after the declarations, which reinforces their normative force.¹²²

The two significant landmarks reflected international awareness at the time of their creation. For instance, one year before Stockholm, in 1971, Greenpeace,¹²³ EarthWatch Institute,¹²⁴ and Ocean Conservancy¹²⁵ were founded. But, also, Stockholm

¹¹⁸ Galizzi, Paolo. From Stockholm to New York, *supra* note 2, p. 1002.

¹¹⁹ United Nations. Report of the United Nations Conference on the Human Environment, *supra* note 3.

¹²⁰ Handl, Guinter, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992, United Nations Audiovisual Library of International Law, available at <http://legal.un.org/avl/ha/dunche/dunche.html>, last accessed on 14 April 2019.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Greenpeace website, available at <https://www.greenpeace.org/international/>, last accessed on 14 April 2019.

¹²⁴ EarthWatch website, available at <https://earthwatch.org>, last accessed on 14 April 2019.

¹²⁵ Ocean Conservancy website, available at <https://oceanconservancy.org/>, last accessed on 14 April 2019.

and Rio forged the understanding the world has today about the environment and sustainable development. Several other national, regional, and international documents, policies, acts, and the creation of NGOs were influenced by the principles stated in Stockholm and Rio declarations.

2.1.3. International Human Rights and the Environment: a growing concept

Almost two decades after the first international document regarding the environment, and contemporary with the Rio Declaration, the first relations between human rights and the environment began to become stronger. Those relations even came up to the discussions in 1972 but, “at the conference, various proposals for a direct and thus unambiguous reference to an environmental human right were rejected.”¹²⁶ Only in 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities “inaugurate[d] a study on the connections between human rights and the environment”¹²⁷ that ended in the appointment of a special rapporteur on human rights and the environment, Ms. Fatma Zohra Ksentini.¹²⁸ The special rapporteur delivered a final report in 1994 that “marked a turning point in the United Nations’ consideration of human rights and the environment.”¹²⁹

Ksentini affirmed that “a few instruments of a binding legal character have established a direct link between the environment and human rights.”¹³⁰ The special rapporteur recalls that, although the 1972 Stockholm Declaration does not directly mention a human right to a satisfactory environment, it does refer that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn

¹²⁶ Handl, Guinter. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), *supra* note 120.

¹²⁷ Popovic, Neil A.F., In pursuit of environmental human rights, *supra* note 7, p. 490.

¹²⁸ *Id.*

¹²⁹ *Id.*, p. 491.

¹³⁰ Ksentini Report, *supra* note 8, p. 59.

responsibility to protect and improve the environment for present and future generations."¹³¹

Ksentini affirmed the two-way relation of human rights and the environment stating that “[e]nvironmental damage has direct effects on the enjoyment of a series of human rights, such as the right to life, to health, to a satisfactory standard of living...to dignity and the harmonious development of one’s personality...to peace, etc.”¹³² And, also, that “human rights violations in their turn damage the environment,”¹³³ quoting examples such as the right to development, participation, and information.

Finally, the special rapporteur praised the work of the regional and international human rights bodies for “enforcing the right to a satisfactory environment”¹³⁴ and for recognizing the “validity of complaints of human rights violations based on ecological considerations.”¹³⁵ It should be observed, for instance, that the Organization of the American States issued the Additional Protocol to the American Convention on Human Rights in 1988, that entered into force in 1999, affirming the “right to a healthy environment.”¹³⁶ Nevertheless, the Inter-American Court of Human Rights (IACourtHR) took almost 20 years to “recognize[]...an ‘autonomous’ right to a healthy environment under the American Convention, in an Advisory Opinion delivered on February 7, 2018.”¹³⁷

After the growing connections between human rights and the environment, some steps still need to be taken to the rights of prisoners to be linked with environmental rights. Although prisons are man-made environments, as affirmed in chapter 1.2, the topic *conditions of detention* is frequently related only to human rights but hardly related to the

¹³¹ *Id.*

¹³² *Id.*, p. 60.

¹³³ *Id.* p. 61.

¹³⁴ *Id.* p. 59.

¹³⁵ *Id.*

¹³⁶ Additional Protocol to the American Convention on Human Rights, Article 11, *supra* note 13.

¹³⁷ Banda, Maria L. Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights, ASIL insights home, v. 22, issue 6, available at <https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human>, last accessed on 14 April 2019.

environment. However, as it will be seen in the following chapter, the approximation between human rights and the environment is still an ongoing movement that will end up changing the approach one might have when dealing with *conditions of detention*: a shift from human rights to an environmental approach.

2.2. Environment and Human Rights in prisons: the foundation of a new concept

Although the first relations between environment and human rights took place in the late 1980s and early 1990s, the notion is still strengthening internationally. The recognition of an autonomous right to a healthy environment under the American Convention is recent, and its effects cannot be entirely understood in daily basis practice in areas such as the *conditions of detention*. Nonetheless, governments, national agencies, NGO's, and even human rights experts have not properly developed the concept that prisons are man-made environments subject to hazards that affect the human rights of a particularly vulnerable population. The Ksentini 93-page report, for instance, did not dedicate one single line to prison conditions or prisoners' rights.

This is a concept that must be built in the coming years, and it is a work that is being already made by some organizations related to the rights of prisoners. In the United States, for instance, those organizations began to relate environmental hazards to violations of human rights in prisons around the year 2000. The Human Rights Defense Center initiated the Prison Ecology Project, to “examine[] the intersection between criminal justice and environmental justice, including the impact of detention facilities on the environment (such as sewage spills into local waterways from prisons and jails), and the impact of the environment on prisoners and prison staff.”¹³⁸ This group has addressed a letter asking the Environmental Protection Agency (EPA) to include prison issues in its 2020 Environmental Agenda with the support of another 138 organizations and individuals.¹³⁹

¹³⁸ Human Rights Defense Center website, available at <https://www.humanrightsdefensecenter.org/about/>, last accessed on 14 April 2019.

¹³⁹ Prison Legal News website, *supra* note 64.

Even recognizing the relations between prisons and the environment back in 2007,¹⁴⁰ the EPA did not mention it in its 2020 Environmental Justice Agenda.¹⁴¹

The contempt in including issues of prisoners as an environmental concern cannot be explained by its unfitness in the Environmental Justice goals, however. According to the EPA, “[e]nvironmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁴² And, prisoners are a particularly vulnerable population concerning race, color, national origin, and income. In the United States, the white population in prison amounts to 380 per 100,000, while Hispanic sums 966 per 100,000 and Black 2,207 each 100,000,¹⁴³ while the median annual incomes for incarcerated people range from 21% to 54% lower than non-incarcerated people depending on race, ethnicity, and gender.¹⁴⁴

Also, Bencke and others¹⁴⁵ classify prisoners as “involuntarily displaced populations” or “dislocated populations” such as “orphanages, prisons, and refugee and Internally Displaced Persons (IDP) settlements.”¹⁴⁶ It means that those groups “share dependency on others for their health and well-being, and often have heightened vulnerability,”¹⁴⁷ and, for this reason, they should have special attention from the authorities who determine the displacement or the dislocation.

¹⁴⁰ United States. Environmental Protection Agency of the United States, Federal Prisons to Get Environmental Checks, available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/ac0e8764a666f41685257323006756ab.html, last accessed on 14 April 2019.

¹⁴¹ United States. Environmental Protection Agency of the United States, EJ 2020 Action Agenda, available at https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf, last accessed on 14 April 2019.

¹⁴² United States. Environmental Protection Agency of the United States, Environmental Justice, available at <https://www.epa.gov/environmentaljustice>, last accessed on 14 April 2019.

¹⁴³ Prison Policy Initiative, U.S. incarceration by race, available at <https://www.prisonpolicy.org/graphs/raceinc.html>, last accessed on 14 April 2019.

¹⁴⁴ Prison Policy Initiative, Reports, available at <https://www.prisonpolicy.org/reports/income.html>, last accessed on 14 April 2019.

¹⁴⁵ Behnke, Nikki *et al.* Improving environmental conditions, *supra* note 96.

¹⁴⁶ *Id.*, p. 1.

¹⁴⁷ *Id.*, p. 5.

As an involuntarily displaced person, “the State takes [the prisoner] into its custody and holds him there against his will...[thus] the Constitution [or the international human rights rules] imposes upon it a correspondent duty to assume some responsibility for his safety and general well-being.”¹⁴⁸ In that situation, prisoners cannot interfere in the environment to avoid harm to their life, health, or dignity the same way that a free person can. For this reason, prisoners are particularly affected by environmental hazards.

Beck states that “[s]ome people are more affected than others by the distribution and growth of risks,”¹⁴⁹ which is the case of vulnerable populations. Vulnerable groups have become a concern after the growing confluence between international human rights and the environment, and are identified in Agenda 21 of the Rio Conference as groups “such as rural landless workers, ethnic minorities, refugees, migrants, displaced people, women heads of household.”¹⁵⁰ However, the list is mere exemplification, open to the inclusion of other groups and specifications of the groups already identified.¹⁵¹ Trindade, for example, argues that “along with the circumscribed groups mentioned above, a considerable number of people are now in extremely vulnerable conditions due to the phenomenon of general impoverishment, which has been getting worse since the early 1980s.”¹⁵² The scholar reminds that, for example, disabled persons can be included under a vulnerable position.¹⁵³

The Agenda 21, that “aims at preparing the world for the challenges of the next century [and] reflects a global consensus and political commitment at the highest level of development and environment cooperation” mentioned “vulnerable groups” (or

¹⁴⁸ Helppie-Schmieder, Brenna. Toxic confinement: can the eighth amendment protect prisoners from human-made environmental health hazards?, *Northwestern University Law Review*, v. 110, p. 648.

¹⁴⁹ Beck, Ulrich. *Risk Society: Towards a New Modernity*, *supra* note 18, p. 23.

¹⁵⁰ United Nations. Agenda 21, United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, paragraph 5.21, available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, last accessed on 31 October 2019.

¹⁵¹ Especially considering the use of the term “such as” listing the vulnerable groups in paragraph 5.21.

¹⁵² Trindade, A. A. Cançado. *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Ambiental*, Sérgio Antônio Frabris Editor, Brazil, 1993, p. 96.

¹⁵³ *Id.*

“vulnerable populations”) eleven times in its text, in several provisions along the document, which states the importance that has been given to this issue.¹⁵⁴

Therefore, either in respect of race, color, national origin, and income, or because inmates are “involuntarily displaced persons” they must be recognized as a vulnerable group, likely to be affected by environmental risks that they can barely interfere, and then receive the special attention foreseen in international environmental rights documents. However, if prisoners are vulnerable, what does explain the hesitancy to include them in an environmental justice agenda?

The [i]ncarcerated people rarely attract the sympathy of the general population and are often socially ostracized”¹⁵⁵, what makes the environmental hazards faced by the prisoners a secondary issue in the governmental decisions. This subordinate position helps to explain the scarcity of resources appropriated to prisons in the United States and worldwide. The President of the International Committee of the Red Cross described its reality in the Annual Conference of the International Corrections and Prisons Association in Namibia (2014):

We all know that detainees are – by the fact of their isolation – vulnerable and it is our task and goal to protect them from arbitrary practices, persecution and abuse: Not only children, but the elderly or sick people are also vulnerable. Persons under interrogation, or accused of crimes against the State, those convicted to long-term or death sentences need our particular attention as humanitarian actors. One observation I have made again and again in our contacts with penitentiary services across the world is that for most politicians and institutional politics, prisons are never a priority. Resources, in particular financial resources, are scarce for present needs as well as for planning and conceptual work. As a consequence, many of the challenges in detention can be traced back to a simple, yet fundamental failure to keep prisons and corrections in step with the modern world. This is reflected in outdated legislation, practices, and buildings, which then result in anything from food shortage to overcrowding.¹⁵⁶

As a result of the secondary position in governments’ concerns, conditions of detention became chaotic with the rise of the prison population in countries such as the

¹⁵⁴ Besides the mention in several paragraphs along the text, in Chapter 6, Title C, there is as Programme dedicated to vulnerable group in the chapter “Protection and Promoting Human Health.”

¹⁵⁵ Behnke, Nikki *et al.* Improving environmental conditions, *supra* note 96, p. 3.

¹⁵⁶ International Committee of the Red Cross. Annual Conference of the International Corrections and Prisons Association (ICPA), statement by Peter Maurer, ICRC president, Windhoek, Namibia, 2014, available at <https://www.icrc.org/en/document/annual-conference-international-corrections-and-prisons-association-icpa>, last accessed on 14 April 2019.

United States and Brazil in the last decades. In the United States, the prison population jumped from 503,586 to 2,217,947 from 1980 to 2014, with the incarceration going from 220 to 693 prisoners per 100,000 in the same period.¹⁵⁷ In Brazil, the prison population increased from 32,573 to 726,712 from 1973 to 2016, with the incarceration rate escalating from 32 to 347 prisoners per 100,000 during this time.¹⁵⁸

The above-explained “mass incarceration” directly impacts the physical conditions of the prisons. Therefore, water infiltration, leaking, humidity stains, fungi, mold, apparent electrical networks, inexistence of sewerage system, overcrowding, feces, urine, remains of food, dirt, rats, cockroaches, and exposure to extreme temperatures,¹⁵⁹ contamination, and chemical exposure constitute the environment in prisons worldwide and particularly in Porto Alegre Central Prison, Brazil.

All those factors raise threats to the life, health, and dignity of the inmates. At the same time, authorities do not provide precise information about the mentioned harms and their causes. Nonetheless, scientific studies relate environmental threats with the violations of the rights of prisoners. Jacobi brings a picture of the health of the inmates in the United States while in prison and, also, when they are released. The conclusion is that “[t]he two million adult prisoners in the U.S. do not reflect a cross-section of America..., they are sicker.”¹⁶⁰ The scholar is grounded in the data provided by the Re-Entry Policy Council – formed by the Council of State Governments – and the National Commission on Correctional Health Care. Conditions such as “chronic illness, communicable diseases, and severe mental disorders among people in jail and prison are far greater than among other people of comparable ages.”¹⁶¹

Regarding communicable diseases, [c]ompared to the general population, it has been estimated that ‘rates of human immunodeficiency virus (HIV) infection . . . are 8 to 10 times higher, rates of hepatitis C are 9 [to] 10 times higher, and rates of tuberculosis

¹⁵⁷ World Prison Brief website, available at <http://www.prisonstudies.org/country/brazil>, last accessed on 14 April 2019.

¹⁵⁸ *Id.*

¹⁵⁹ See Table 1, Environmental hazards at Porto Alegre Central Prison, chapter 1.4.

¹⁶⁰ Jacobi, John V., Prison Health Public Health: Obligations and Opportunities, *supra* note 99, p. 449.

¹⁶¹ *Id.*, p. 450, quoting Re-entry Policy Council, Report of the Re-Entry Policy Council: Charting the safe and successful return of prisoners to the community, 157, 2005.

are 4 [to] 7 times higher.”¹⁶² Those higher rates are also observed concerning chronic illness – such as asthma – and mental illness. In Central Prison, the leading cause of death is communicable diseases. “According to a survey published in October 2011, among 229 deaths, bronchopneumonia represented 53.23% of the cases, followed by...tuberculosis... 33.14%.”¹⁶³ Those rates are completely divergent with the free Brazilian population, in which communicable diseases represent only 14% of the deaths’ causes.¹⁶⁴ Referring to tuberculosis, the World Health Organization affirms that “[p]rison conditions can fan the spread of disease through overcrowding, poor ventilation, weak nutrition, inadequate or inaccessible medical care, etc.”¹⁶⁵ Also, the UN health agency affirms that environmental factors such as water supply, sanitation facilities, food, and climate influence the spread of communicable diseases.¹⁶⁶

However, most of these issues were studied by the lens of the administrative, criminal, or human rights law, focused on the individual rights of the detainees. According to Bernd and others, “until recently, not much thought or research had been expended on the connections between mass incarceration and environmental issues;”¹⁶⁷ however, the ongoing approximation between human rights and environment built the foundation to relate environmental hazards in prisons with specific violations of human rights. The special rapporteur Ksentini has “stressed how vulnerable certain peoples, populations, groups or categories of persons are to ecological hazards...[and] has pointed out that the poor and disadvantaged, minority groups, women, children, migrant workers, and their families, refugees and displaced persons are generally those most affected and

¹⁶² *Id.*, p. 451, quoting Nicholas Freudenberg, *Jails, Prisons, and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health*, *Journal of Urban Health*, v. 78:2, p. 217.

¹⁶³ AJURIS website, *supra* note 81.

¹⁶⁴ Banco Nacional do Desenvolvimento website, available at <https://www.bndes.gov.br/wps/portal/site/home/conhecimento/noticias/noticia/causas-mortes-brasil>, last accessed on 14 April 2019. According to the survey, 74% of the deaths are caused by non-transmissible diseases, and 12% are related to external causes.

¹⁶⁵ World Health Organization website. *Tuberculosis in prisons*, available at <https://www.who.int/tb/areas-of-work/population-groups/prisons-facts/en/>, last accessed on 14 April 2019.

¹⁶⁶ World Health Organization website. *Environmental factors influencing the spread of communicable diseases*, available at https://www.who.int/environmental_health_emergencies/disease_outbreaks/communicable_diseases/en/, last accessed on 14 April 2019.

¹⁶⁷ *Id.*

least protected.”¹⁶⁸ Yet not explicitly mentioned, the special rapporteur on human rights and the environment *opens the door* to consider prisoners subject of special attention regarding environmental hazards. According to Bencke, prisoners are “involuntarily displaced people,”¹⁶⁹ which makes them vulnerable to environmental hazards, according to Ksentini.

Therefore, although the concepts of environmental law and human rights have constantly evolved over the last decades, a next step still needs to be taken in order to consider environmental damages in prisons as an impacting factor to achieve basic human rights of the inmates. This next step is being designed since the birth of human rights and environmental regimes. It advanced through the growing relations between the environment and human rights. It heard the clamor of organizations engaged in the rights of prisoners, and it should develop to the recognition that prisoners are a vulnerable group, and reach the formulation of specific environmental policies in prisons at national, regional or international level.

This next step is the foundation of a new concept, that broadens the discussions of human rights violations in prisons, shifting the approach from administrative, criminal, political and civil individual rights, to economic and social, collective rights. And collective rights not only of the criminal population – which would be already an evolution – but rights of the general population, following Beck's risk society theory. But why does this new concept matter?

In the next chapters, it will be discussed the current use of the Inter-American System to redress environmental issues in prisons and its flaws regarding enforceability. The discussions related to prison conditions in the Inter-American system are not currently focused on the environment, but primarily on violations of human rights standards. At the same time, even with the efforts of the Inter-American bodies on pressuring governments to comply with rulings that determine specific performance or structural measures – usually required to redress environmental damages – the will of the States prevail, and problems remain unsolved. In addition, individual and collective

¹⁶⁸ Ksentini Report, *supra* note 8, p. 60.

¹⁶⁹ Behnke, Nikki *et al.* Improving environmental conditions, *supra* note 96.

enforcement at the domestic level still struggle to take place, considering a restrictive interpretation of the binding power of the IACourtHR decisions.

However, new perspectives to solve the issue of prison conditions could arise if the discussion migrates from a human-rights-only approach to an environmental-human-right approach. National legal frameworks with strong enforcement measures in environmental matters – like Brazil – could interact with the Inter-American System providing – and receiving – theoretical grounds and concrete remedies to bring solutions for these issues. In order to discuss these proposals in chapter 4, the next chapter will delineate the panorama of how cases of *conditions of detention* are raised before the Inter-American System.

CHAPTER THREE. THE USE OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS TO REDRESS FOR ENVIRONMENTAL ISSUES IN PRISONS

The Inter-American System for the protection of human rights serves as an essential tool to scrutinize violations of human rights in the American Hemisphere. Either by investigating alleged violations among the member states, by issuing country reports, by analyzing individual petitions with binding or non-binding power or finally by issuing advisory opinions in specific cases, the IACHR or the IACourtHR act in promoting and protecting human rights along the American States.¹⁷⁰

Among those functions, one essential characteristic of the system is the possibility of individuals, groups, or non-governmental organizations directly file petitions complaining about violations of the American Convention.¹⁷¹ The complaints from individuals, groups, or non-government organizations get into the system for the protection of human rights through the IACHR. If the complaint is admissible, the IACHR takes the necessary actions¹⁷² and even submits the case to the IACourtHR, which can decide the case with binding power to the States that accept the IACourtHR's contentious jurisdiction.¹⁷³

Numerous violations of the American Convention get into this system each year. Data dating back to 1997 indicate that in this first year, the system received 435 petitions. This number raised year-by-year, with some minor variation, up to 2494 petitions in 2017.¹⁷⁴ From this universe, several cases discussed the *conditions of detention*.¹⁷⁵ Some of them dealt with the topic as the main issue; other cases were only an incidental issue.

Nonetheless, in all those cases, the discussion was never linked to the environment, yet since the Additional Protocol of San Salvador, there's a specific

¹⁷⁰ Organization of the American States website. IACHR, available at <http://www.oas.org/en/iachr/>, last accessed on 14 October 2019.

¹⁷¹ American Convention on Human Rights, *supra* note 110, Article 44.

¹⁷² See details below in chapter 3.1.

¹⁷³ American Convention on Human Rights, *supra* note 110, Articles 44-52.

¹⁷⁴ Organization of the American States website. IACHR, Multimedia, Statistics, available at <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html>, last accessed on 31 October 2019.

¹⁷⁵ See details below in chapter 3.2.

provision regarding the right to a healthy environment.¹⁷⁶ The IACHR and the IACourtHR invariably mention the expression “conditions of detention,” “prison conditions,” “conditions of incarceration,” ignoring that the environment represents “the circumstances, objects, or *conditions* by which one is surrounded.”¹⁷⁷ In essence, when the issue *conditions of detention* are at stake, the discussion can vary from violations of individual rights to environmental issues. The use of the Inter-American System for environmental rights discussions occurs for three main reasons: (1) The lack of specific machinery to protect the environment in regional or international level; (2) The impact of environmental issues on human rights; (3) The existence of a structured machinery to protect human rights in the regional level that accepts the discussion of issues that impact human rights.

The adoption of the Inter-American System must be celebrated because it provides remedies to discuss environmental issues at the regional level and even to prompt States to resolve some of these issues identified by the system. But on the other hand, human rights theory is traditionally focused on the individual – even as part of a group – while environmental theory is focused on collective rights, not necessarily related to a specific individual.¹⁷⁸ Some scholars even relate environmental rights to a third generation of rights, the so-called “solidarity rights,”¹⁷⁹ that transcend individuals and even generations.¹⁸⁰ ¹⁸¹ This important difference in nature between human rights and environmental rights¹⁸² makes the human rights machinery not fully appropriate to

¹⁷⁶ Additional Protocol to the American Convention on Human Rights, *supra* note 13.

¹⁷⁷ Merrian-Webster Dictionary, *supra* note 36.

¹⁷⁸ See Engle, Eric. Universal Human Rights: A generational story, *supra* note 4. Also see Sayto, Natso T. Colloquium Proceedings, *supra* note 4, p. 389.

¹⁷⁹ Vasak, Karel. A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights, The UNESCO Courier, November 1977, p. 29. The author refers that among the solidarity rights are included, the right to development, the right to a healthy and ecologically balanced environment, the right to peace, and the right to ownership of the common heritage of mankind.

¹⁸⁰ United Nations Environment Program website. UNEP Training Manual on International Environmental Law, available at <https://www.unenvironment.org/resources/report/unep-training-manual-international-environmental-law>, last accessed on 31 October 2019.

¹⁸¹ Cornescu, Adrian V. The Generations of Human’s Rights, *supra* note 5, p. 6.

¹⁸² McGoldrick, Dominic. Sustainable Development and Human Rights: an integrated conception, The International and Comparative Law Quarterly, v. 45, n. 4, Oct. 1996, 796, pp. 811-812.

provide the best tools to restore environmental hazards.¹⁸³ So it is necessary to understand the tools that the Inter-American System of protection of human rights provides, starting by studying its founding documents and its bodies.

3.1. The Inter-American System of protection of human rights

The Inter-American system for the protection of human rights is inserted in the Organization of the American States (OAS) and executed primarily by two of its bodies: The IACHR and the IACourtHR. However, to better understand their roles in the mission of protecting human rights, it is essential to bring up three framework documents: The OAS Charter,¹⁸⁴ The Declaration of the Rights and Duties of Man,¹⁸⁵ and The American Convention on Human Rights.¹⁸⁶

The American States held International Conferences since 1890, however a constitutional instrument was only adopted at the Ninth International Conference at Bogotá on April 30, 1948, by the 21 participant States at the Conference,¹⁸⁷ and today “all 35 American states have ratified the OAS Charter and are member States, with the exception of Cuba.”¹⁸⁸ The Charter establishes the Organization of the American States “to achieve an order of peace and justice, to promote their solidarity, to strengthen their

¹⁸³ Atapattu, Sumudu. The Right to a Healthy Life *supra* note 6, p. 71. The author affirms that “[u]nlike human rights issues, which are often individual in nature (except, of course, issues such as genocide, apartheid and slavery), environmental violations often involve groups and communities, are global in dimension, and sometimes affect even future generations. Environmental violations also involve the right of other species to survive. This is referred to as the ‘ecocentric approach.’ The human rights machinery obviously cannot deal with such issues.”

¹⁸⁴ Organization of the American States Charter, available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp#Chapter_VIII, last accessed on 16 August 2019.

¹⁸⁵ American Declaration of the Rights and Duties of Man, available at https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf, last accessed on 09 October 2019.

¹⁸⁶ American Convention on Human Rights, *supra* note 110.

¹⁸⁷ Hudson, Manley O. Charter of the Organization of American States, Bogota, 30 April 1948, Naval War College International Law Studies, v. 46-1, 2014. The 21 participant states were Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.

¹⁸⁸ Bol, Jennifer. Using International Law to Fight Child Labor: A case Study of Guatemala and the Inter-American System, American University International Law Review, v. 13, issue 5, p. 1197.

collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”¹⁸⁹ To achieve those goals, the OAS Charter created the following organs: “a) The General Assembly; b) The Meeting of Consultation of Ministers of Foreign Affairs; c) The Councils; d) The Inter-American Juridical Committee; e) The Inter-American Commission on Human Rights; f) The General Secretariat; g) The Specialized Conferences; and, h) The Specialized Organizations.”¹⁹⁰

In the same Conference of Bogotá, the states also adopted the Declaration of the Rights and Duties of Man as a non-binding document proclaiming, “numerous civil, political, economic, social, and cultural rights,”¹⁹¹ some months before the notorious Universal Declaration of Human Rights, that was adopted in December 1948.¹⁹²

The American Convention was adopted at the Inter-American Specialized Conference on Human Rights in San José, Costa Rica, on November 22, 1969.¹⁹³ The document was initially signed by 12 countries,¹⁹⁴ and eventually, the other 13 countries accepted the document by signature, ratification, or accession, making a total of 25 depositary countries.¹⁹⁵ The American Convention entered into force on July 18, 1978, at the deposit of the eleventh instrument of ratification or adherence.¹⁹⁶ The text of the Convention reaffirms the rights and principles of the OAS Charter and the Declaration of The Rights and Duties of Man in a binding document, focusing on civil and political

¹⁸⁹ Organization of the American States Charter, *supra* note 184.

¹⁹⁰ *Id.*, Article 53.

¹⁹¹ Antkowiak, Tomas M. *et al.* The American Convention on Human Rights: essential rights, Oxford University Press, New York, 1 ed., 2017, p. 5.

¹⁹² Universal Declaration of Human Rights, *supra* note 105.

¹⁹³ American Convention on Human Rights, *supra* note 110.

¹⁹⁴ Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Uruguay.

¹⁹⁵ Argentina, Barbados, Brazil, Dominica, Grenada, Haiti, Jamaica, Peru, Dominican Republic, Suriname, Trinidad & Tobago (denounced the Convention in May 26, 1998), and Uruguay. It is interesting to mention that the United States only signed the Convention in June 1, 1977, but it did not ratify it. Also, although Venezuela previously denounced the Convention in 2012 under Hugo Chavez Government, the State appears as having ratified it in July 1, 2019, and having deposited in July 31, 2019, under the legal imbroglio caused by the recognition of Juan Guaido Government by the OAS.

¹⁹⁶ Organization of the American States website. Multilateral Treaties, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm, last accessed on 17 August 2019.

rights such as the life, humane treatment, personal liberty, privacy, freedom of expression, association, property, participation in government, but also states the “progressive development” for the economic, social, and cultural rights in its article 26.¹⁹⁷

The American Convention defines in Article 33 the means of protection of the commitments made by the States Parties, establishing the IACHR and the IACourtHR as the competent bodies to execute this role.¹⁹⁸

The IACHR is composed of seven members and its “main function...[is] to promote respect for and defense of human rights”¹⁹⁹ in all American States, even in Cuba, that was barred from membership in 1962.²⁰⁰ Essentially, the IACHR (1) Monitors “the situation of human rights in all countries of the hemisphere, publishing reports on subjects and countries of special concern;”²⁰¹ (2) Takes action on petitions containing denunciations or complaints of violation of a State, issuing recommendations to the member States and submitting cases to the IACourtHR;²⁰² and (3) Serves as a consultative and advisory organ, assisting other bodies of the Organization of the American States as well as the IACourtHR.²⁰³

The IACourtHR, also composed of seven members, is the judicial body of the Inter-American System, and its function is “to hear contentious cases between states, or against one state at the request of the IACHR, regarding violations of the American Convention.”²⁰⁴ The jurisdiction of the IACourtHR is limited to the states that recognize as binding on all matters relating to the interpretation or application of this Convention,²⁰⁵

¹⁹⁷ American Convention on Human Rights, *supra* note 110.

¹⁹⁸ *Id.*, Article 33.

¹⁹⁹ *Id.*, Article 41.

²⁰⁰ Shaver, Lea. The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?, Washington University Global Studies Law Review, v. 9, p. 650, 2010.

²⁰¹ *Id.*, p. 647.

²⁰² American Convention on Human Rights, *supra* note 110, Article 61.

²⁰³ Bol, Jennifer. Using International Law to Fight Child Labor, *supra* note 188, p. 1201.

²⁰⁴ *Id.*

²⁰⁵ American Convention on Human Rights, *supra* note 110, Article 62.

²⁰⁶ either “generally or on a case-by-case basis.”²⁰⁷ The IACourtHR also has an advisory jurisdiction, which is the non-binding power to answer the consult of the member states “regarding the interpretation of the Convention or other treaties concerning the protection of human rights in the American states.”²⁰⁸

Both the IACHR and the IACourtHR form a “dual-layer” system for the protection of human rights in which the complaints of violations are initially directed to the IACHR. The IACHR then takes the necessary actions, which can include analyzing the facts, issuing precautionary measures, and recommendations to the Member States. In case the violations continue, and the State does not comply with the recommendations, the IACHR has the power to submit the case to the IACourtHR, acting as “‘an auxiliary of the judiciary,’ [in a role that] has been described as akin to *ministerio público* in Latin American criminal justice system,”²⁰⁹ acting as a protector of the public interest. The IACourtHR, then, can decide the case with binding power to the States that accept the IACourtHR’s contentious jurisdiction,²¹⁰ ruling that the injured party be ensured the enjoyment of his violated right or freedom or be compensated by the injured party.”²¹¹

The Inter-American “dual-layer” system for the protection of human rights is the stage of several cases regarding the *conditions of detention*, either in the IACHR or in the IACourtHR, as will be analyzed below.

3.2. Cases related to the conditions of detention in the Inter-American System

The issue *conditions of detention* in prisons, detention centers, or police stations have been discussed by the IACHR and the IACourtHR for years. Some cases bring the

²⁰⁶ Currently 20 countries recognize the jurisdiction of the Inter-American Court of Human Rights generally. See Organization of the American States website. Multilateral Treaties, American Convention on Human Rights, “Pact of San Jose, Costa Rica”, *supra* note 196.

²⁰⁷ Bol, Jennifer. Using International Law to Fight Child Labor, *supra* note 188, p. 1201.

²⁰⁸ American Convention on Human Rights, *supra* note 110, Article 64.

²⁰⁹ Antkowiak, Tomas M. *et al.* The American Convention on Human Rights, *supra* note 191, p. 11, quoting the Separate Opinion of Judge Rodolfo E. Piza, para. 4, In the Matter of Viviana Gallardo et al., Inter-Am.Ct.H.R (ser. A) N.101 (July 15, 1981).

²¹⁰ American Convention on Human Rights, *supra* note 110, Article 62.

²¹¹ *Id.*, Article 63.

conditions of detention as the main issue, while others have it mere incidentally. All of those categories are essential to understand how the orders and recommendations issued within the Inter-American System received by the States, how is the decision-making process, how the States react and comply with them.

Considering the nature of the facts, this study cannot rely only on official reports due to their limitations or even some bias. Then, besides the IACHR country visits reports, media articles and interviews are essential tools for collecting data on the current situation of prisons, detention centers, and police stations.

3.2.1. Cases before the Inter-American Commission on Human Rights

The IACHR has analyzed several cases regarding *conditions of detention*. Although the IACHR does not deliver binding decisions, it is in this stage that most petitions find their solution: (1) States can comply with the IACHR's recommendations; (2) States and plaintiffs can settle agreements; or (3) IACHR can monitor State compliance with recommendations. Just a few of those petitions get to the IACourtHR²¹² – as it will be explored next chapter – and their main issue is generally individual rights, with the *conditions of detention* being discussed as a mere incident.

The IACHR deals with cases of individual or collective interests, and, considering the object of this thesis, the focus of the analysis will be cases where collective rights are at stake. Those cases are frequently named as “*Persons Deprived of Liberty at* [the location at concern],”²¹³ and they do not focus primarily on individual compensation, but on redressing the *conditions of detention* of a specific prison, detention center, or police station. And that will be the scope of this thesis, more specifically the precautionary measures regarding the *conditions of detention* in the last twenty years.

²¹² Organization of the American States website. IACHR, Multimedia, Statistics, *supra* note 174. Among all the universe of cases, the number of petition received ranges from 435 (in 1997) to 2494 in (2017), while the number of cases sent to the IACourtHR range from 2 (in 1997) to 17 (in 2017), achieving its maximum in 2011 with 23 cases.

²¹³ One example is the Case of Study: “Persons Deprived of Liberty at the Porto Alegre Central Prison, Brazil.”

The investigation found 21 precautionary measures,²¹⁴ 12 of which referred to Brazil, 4 to Argentina, and only 1 to each of the following countries: Paraguay, Haiti, Bahamas, Venezuela, and Panama. It means that Brazil is the recipient of more than half of the precautionary measures granted by the IACHR in the last 20 years. This data evidences the chaotic prison system in Latin America's largest country and that the access to the Inter-American system of protection of human rights is not a novelty. If, on the one hand, in some cases, Brazil acted to solve the issues, on the other hand, problems have been unsolved or replicated to other places, as shown in the examples below.

On December 21, 2004, the IACHR granted precautionary measures in favor of children confined in FEBEM Tatuapé, São Paulo. One of the allegations was “deplorable sanitary and building conditions.”²¹⁵ After the precautionary measures, the center was destroyed to eventually give place to a park.²¹⁶ On November 11, 2005, the IACHR granted precautionary measures in favor of more than a thousand men deprived of freedom in the cells located in the basement of POLINTER Police District, in Rio de Janeiro, Brazil. The argument was that they were being held under inhumane and degrading conditions of detention and overcrowding. The State completely deactivated the place on January 31, 2006, transferring the men to prisons.²¹⁷

Those two cases are examples of the efficiency and efficacy of the system, especially when it relies on the IACHR's work. The IACHR acts relatively fast on granting the measures, and, in both cases, Brazil entered in compliance by deactivating the facilities. No other action was necessary besides the IACHR decision and State compliance.

On the other hand, Porto Alegre Central Prison – the case study – as well as Aníbal Bruno Prison (currently named Curado Prison Complex), are examples of how the flaws of enforceability and the predominance of the will of the State to comply can put the effectiveness of the Inter-American System in check. In both cases, the IACHR granted

²¹⁴ Organization of the American States website. IACHR, *supra* note 170.

²¹⁵ Inter-American Commission on Human Rights website. Precautionary Measures, available at <http://www.cidh.org/medidas/2004.eng.htm>, last accessed on 15 August 2019.

²¹⁶ Folha de São Paulo. Serra conclui desativação da Febem do Tatuapé, 16 October 2007, available at <https://www1.folha.uol.com.br/fsp/cotidian/ff1610200726.htm>, last accessed on 15 August 2018.

²¹⁷ Inter-American Commission on Human Rights website. Precautionary Measures, *supra* note 215.

precautionary measures. However, the issues that grounded the petition before the IACHR still remain unsolved even after several years. The conditions of detention in Central Prison are pretty much the same as the ones in 2013, as described above in the first chapter, and according to the terms of the petitioner's final arguments in the case 13.353 (MC 08-13) before the IACHR on November 24, 2017,

Thus, from the analysis of the reports and data collected as a result of the visit of the representatives of the Forum of the Penitentiary Issue to the Central Prison on October 16, 2017, it was possible to notice that, except for the health issue, the factual reality exposed in the representation in 2013 remains the same or even worse. Moreover, except for the health issue, the measures requested by the Commission in Precautionary Measure 8-13 were not complied with, and the vast majority of human rights violations still remain.²¹⁸

The same situation occurs to Aníbal Bruno Prison (Curado Prison), Recife, State of Pernambuco. In this case, the IACHR granted precautionary measures on behalf of the people deprived of their freedom [at the prison] on August 4, 2011, due to several issues, including the *conditions of detention*.²¹⁹ However, a Resolution of the IACourtHR dated November 28, 2018, mentioned that previous resolutions issued by the IACourtHR on May 22, 2014; October 7, 2015; November 23, 2016; November 15, 2017, are still not being fully complied.²²⁰ And more, on May 14, 2019, a Brazilian newspaper interviewed the prosecutor Fernando Falcão that conducted a visit at the prison that same month, that affirmed that “[t]he structure is still very bad; [p]risoners continue to sleep in corridors, in sheds, or in so-called ‘pigeon houses’ (cells in the upper parts of the sheds); [t]he commission that visited the complex considered the situation very bad.”²²¹

²¹⁸ Forum of the Penitentiary Issue. Petitioner's Final Argument in case #13.353 before the IACHR.

²¹⁹ Inter-American Commission on Human Rights website. Precautionary Measures, *supra* note 215.

²²⁰ Inter-American Commission on Human Rights. November 28, 2018 Resolution regarding the Provisional Measures of the Curado Prison Complex, available at http://www.corteidh.or.cr/docs/medidas/curado_se_06_por.pdf, last accessed on 15 August 2019.

²²¹ Jornal do Comércio, Ronda JC, available at <https://jc.ne10.uol.com.br/blogs/rondajc/2019/05/14/estrutura-do-complexo-do-curado-ainda-e-muito-ruim-diz-promotor/>, last accessed on 16 August 2019.

3.2.2. Cases before the Inter-American Court of Human Rights

Among the cases before the IACourtHR in which the *prison environment* was one of the issues, two of them substantially focused on collective rights: *Juvenile Reeducation Institute v. Paraguay*²²² and *Pacheco Teruel et al. v. Honduras*.²²³ The other cases predominately involve the rights of one or more specific individuals. Although other issues were under analysis, both cases started specifically with the concern about the *conditions of detention*. In those cases, the discussion frequently shifted from the issue of *conditions of detention*, because of factual changes during the years. Also, it is interesting to analyze the content of the IACourtHR orders – compensation and specific performance – as well as the follow-up of the state compliance.

3.2.2.1. Case “*Juvenile Reeducation Institute v. Paraguay*”

The case started before the IACHR on August 14, 1996, addressing, among other issues, the conditions of detention at Panchito López Juvenile Reeducation Institute, a juvenile reeducation center in Paraguay. According to the reasoning of the decision,²²⁴ the issues in the facility were overcrowding, lack of security and safety, unsanitary cells with few hygienic facilities, lack of alimentation and proper medical care, few opportunities to exercise or to participate in recreational activities, lack of beds, blanket and/or mattress, forcing many of them to sleep on the floor, take turns with their fellow inmates, or share beds and mattresses. The IACHR tried to make friendly settlements and recommended several measures, such as the immediate transfer of the inmates to more adequate facilities. After years of processing before the IACHR, as well as a series of fires, riots, deaths, and even the closure of the institute and transfer of inmates to a new place – Itaguá Juvenile Detention Center –, Paraguay did not comply with the recommendations, and the IACHR brought the case to the IACourtHR in 2002. The

²²² *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 112, (Sept. 2, 2004), available at https://iachr.ils.edu/sites/default/files/001_juvenile_reeducation_institute_merits_2004.pdf, last accessed on 07 August 2019.

²²³ *Pacheco Teruel et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 241 (Apr. 27, 2012), available at https://iachr.ils.edu/sites/default/files/iachr/Court_and_Commission_Documents/Pacheco%20Teruel%20et%20al.%20v.%20Honduras.Merits.04.27.12.pdf, last accessed on 12 August 2019.

²²⁴ *Id.*, paragraphs 134.4 to 134.9.

IACHR argued before the IACourtHR that the *conditions of detention* involved a “combination of overpopulation, overcrowding, lack of sanitation, inadequate infrastructure, and a prison guard staff that was both too small and poorly trained.”²²⁵

The IACourtHR ruled against the State, determining specific performance measures as well as compensation to the victims or their families. The compensation for the families involved pecuniary damages in the amount of US\$ 953,000.00²²⁶ and non-pecuniary damages in the amount of US\$ 2,706,000.00,²²⁷ besides costs and expenses. As specific performance, because the institution was permanently closed by the State, there was no determination regarding the redress of its inadequate conditions. However, the State was ordered²²⁸ to (1) publish the judgment; (2) to promote a public act acknowledging international responsibility and announcing a State policy on juveniles in conflict with the law that is consistent with Paraguay’s international commitments; (3) to offer medical and psychological treatment; (4) to provide education and vocational assistance program for all former inmates of the center; and (5) to provide a resting place for the remains of one deceased inmate.

The compliance and follow-up²²⁹ of the IACourtHR ruling illustrate that the State partially complied with the IACourtHR’s determinations. The State partially compensated the victims and the next of kin, and also showed intent and invested public money in special education and vocational assistance program and provide medical and psychological assistance.²³⁰

However, the issue *conditions of detention* – the main reason for all these proceedings before the IACHR and the IACourtH – was not solved. In April 2013, “[i]nmates at the Itaguá Juvenile Detention Center...reported physical mistreatment by

²²⁵ *Id.*, paragraph 4.

²²⁶ *Id.*, paragraph 294

²²⁷ *Id.*, paragraph 309

²²⁸ *Id.*, paragraphs 314-324

²²⁹ Juvenile Reeducation Institute v. Paraguay. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 19, 2009, available at <http://www.corteidh.or.cr/tablas/fichas/institutodereeducaci%C3%B3n.pdf>, Last accessed on 10 August 2019

²³⁰ *Id.*

one of the guards and the unsanitary quality of the food;”²³¹ on July 2013, riots, escapes, electrocutions at the security fence, and injuries were reported;²³² on April 2014, “[t]wo inmates died after a riot,...and two guards were arrested for allegedly using lethal force.”²³³

3.2.2.2. Case “*Pacheco Teruel et al. v. Honduras*” (*San Pedro Sula Prison*)

The case started before the IACHR on July 14, 2005 and it was presented before the IACourtHR on March 11, 2011.²³⁴ The petitioners argued a series of violations of human rights based on the chaotic prison system in Honduras, raising issues such as overpopulation, overcrowding, collapsed electrical, sanitation, and drinking water systems.²³⁵ To exemplify, the maintenance of the electrical installations was in charge of one of the inmates, and it was so deplorable that it caused several incidents of fire, killing hundreds of prisoners in 2003 and 2012.²³⁶ Also, “the physical space for each inmate was approximately one square meter... [without] ventilation or natural light”²³⁷ Finally, “the available ‘tap water’ was inadequate;... latrines had to be filled with buckets; there were no washbasins or showers, and no articles of personal hygiene were provided;...[which]...gave rise to an unhealthy and unhygienic environment and infestations of insects.”²³⁸

The IACourtHR considered that Honduras violated Article 5(1) and 5(2) of the American Convention, due to cruel, inhuman, and degrading detention conditions of the

²³¹ *Juvenile Reeducation Institute v. Paraguay*, Loyola of Los Angeles International and Comparative Law Review, v. 38, 2016, 1446, p. 1471.

²³² *Id.*

²³³ *Id.*

²³⁴ *Pacheco Teruel et al. v. Honduras*, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, 1771.

²³⁵ *Pacheco Teruel et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 241 (Apr. 27, 2012), paragraph 25.

²³⁶ *Id.*, paragraph 24. “On April 5, 2003, at the El Porvenir Prison Farm, La Ceiba, in which 69 individuals died; on February 14, 2012, at the Comayagua Prison Farm, where 367 individuals died, and on March 29, 2012, at the same prison in San Pedro Sula, where another 13 individuals died.”

²³⁷ *Id.*, paragraph 37.

²³⁸ *Id.*, paragraph 40.

prison.²³⁹ Then the IACourtHR determined to the State the specific performance to move on the terms of the settlement agreement signed in 2012 where it undertook “to build a prison to replace the existing San Pedro Sula Prison that would respond to the need to improve the living conditions of those deprived of liberty according to the corresponding international standards.”²⁴⁰ This settlement also included the obligation to improve the other nine prisons in the country.²⁴¹

It is interesting to note that even in the reasoning, the IACourtHR stated its concerns with compliance, evidencing the flaws of the system regarding enforcement mechanisms. The IACourtHR recalled *López Álvarez v. Honduras*,²⁴² where the State should “adopt measures designed to create conditions that ensure the inmates of Honduran prisons an adequate diet, medical attention, and physical and sanitary conditions consistent with the relevant international standards,” but failed to comply even after six years later.²⁴³

In *Pacheco Teruel*, the compensatory measures seem to have a better response of the State concerning compliance, yet they are not disclosed in this case in attention to the terms of the settlement.²⁴⁴ About the specific performance measures – the obligation to build and improve the conditions in San Pedro Sula Prison and other prisons in the country – there is no conclusive data available on the OAS website. However, an article from *The Herald*, a Honduran newspaper, informs that in October 2017, the Government has closed the prison and transferred the last inmates to other places with better conditions.²⁴⁵ This information was complemented by the Head of the Interinstitutional

²³⁹ *Pacheco Teruel et al. v. Honduras*, *supra* note 235.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *López Álvarez v. Honduras*. Merits, reparations and costs. Judgment of February 1, 2006. Series C n. 141.

²⁴³ *Pacheco Teruel et al. v. Honduras*, *supra* note 235, paragraph 94.

²⁴⁴ *Pacheco Teruel et al. v. Honduras*, *supra* note 234, p. 1785.

²⁴⁵ *El Herald*, Centro Penal de San Pedro Sula pasa a la historia, available at <https://www.elheraldo.hn/pais/1116790-466/centro-penal-de-san-pedro-sula-pasa-a-la-historia>, last accessed on 12 August 2019.

Communications of the Honduran National Penitentiary Institute,²⁴⁶ that the prison remains closed since then.

3.2.2.3. *Other cases*

The IACourtHR ruled in at least other (11) eleven cases with the issue of *conditions of detention*. All of them vehiculated individual rights and, only incidentally, included an IACourtHR order to redress for the *conditions of detention*. Frequently the order is merely generic such as “the State must... adopt and implement measures necessary to ensure that the condition of detention...comply with requirements of the American Convention,”²⁴⁷ and even it goes beyond the request in the specific case, expanding the scope of the IACourtHR decision not only for the individuals concerned but for all prisons in that particular country.²⁴⁸

²⁴⁶ Aguilar, Digna. *Head of Interinstitutional Communications of the National Penitentiary Institute*. Interview in 12 August 2019: “en el mes de octubre de 2017, el gobierno cerro de manera definitiva el Centro Penal de San Pedro Sula, asimismo el de Santa Bárbara. Respecto a la población carcelaria, los miembros de maras y pandillas, fueron trasladados a los centros de máxima seguridad en Ilama, Santa Bárbara y Moroceli, el Paraíso.” Translation as, “In the month of October 2017, the government permanently closed the San Pedro Sula Criminal Center, as well as the Santa Barbara Center. Regarding the prison population, the members of ‘maras y pandillas’, were transferred to the maximum security centers in Ilama, Santa Bárbara and Moroceli, el Paraíso.”

²⁴⁷ *Boyce et al. v. Barbados*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, paragraph 127 (Nov. 20, 2007).

²⁴⁸ *Fermín Ramírez v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 126, paragraph 130(f) (Jun 20, 2005).

In *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*²⁴⁹, *Caesar v. Trinidad and Tobago*²⁵⁰, *Yvon Neptune v. Haiti*²⁵¹, *Vélez Loor v. Panama*²⁵², and *Díaz Peña v. Venezuela*²⁵³ the State did not comply with IACourtHR's orders concerning the need to adapt the *conditions of detention* to the international standards. In *Fermín Ramírez v. Guatemala*²⁵⁴, *Raxcacó Reyes v. Guatemala*²⁵⁵, *López Álvarez v. Honduras*²⁵⁶,

²⁴⁹ Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Loyola of Los Angeles International and Comparative Law Review, v. 37, 2014, p. 1091: "This case concerns six issues consisting of: the mandatory death penalty; the process for granting amnesty, pardon, or commutation of sentence; delays in criminal proceedings; deficiencies in treatment and condition of detentions; due process violations; and denial of access to legal aid, all in connection with the criminal proceedings resulting from the victims' murder convictions in Trinidad and Tobago. Due to the similarities in the cases, the Inter-American Court of Human Rights ordered the joinder of the Hilaire, Constantine et al., and Benjamin et al. cases."

²⁵⁰ Caesar v. Trinidad and Tobago, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 1077: "This is a case about Trinidad and Tobago's imposition of corporal punishment. Under the Corporal Punishment Act of 1953, domestic courts may order any male offender above the age of sixteen years to be struck, or flogged, with an object called a 'cat-o-nine tails,' when convicted of certain crimes... As part of his sentence, Mr. Caesar was whipped fifteen times with a "'cat-o-nine tails.'"

²⁵¹ Yvon Neptune v. Haiti, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 1167: "Mr. Yvon Neptune, a Haitian politician and former Prime Minister, was accused of ordering and participating in a massacre. As a result of these allegations, Mr. Neptune was wrongly incarcerated, inhumanely treated while in detention, and denied a fair trial."

²⁵² Vélez Loor v. Panama, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 1143: "This is the case of an Ecuadorian citizen who entered Panama illegally three times. He was expelled two times but at the third time he was arrested, tried and detained. Mr. Vélez Loor was sentenced to a 2-year prison term and allegedly tortured and mistreated."

²⁵³ Díaz Peña v. Venezuela, Loyola of Los Angeles International and Comparative Law Review, v. 37, 2015, p. 1927: "*This case is the proverbial straw that broke the camel's back. It concerns the incarceration and trial by Venezuela of someone suspected of having planted bombs in front of the Spanish and Colombian embassies, and the failure of the State to ensure adequate conditions of detention. As a result of the Court's finding the State responsible for the violation of the rights of the petitioner, Venezuela denounced the American Convention on Human Rights.*"

²⁵⁴ Fermín Ramírez v. Guatemala, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 2143: "*On May 10, 1997, Mr. Fermín Ramírez was illegally arrested by a group of his neighbors for allegedly committing a crime against a minor. Mr Fermín Ramírez was convicted and sentenced to death without the opportunity to seek pardon and to exercise his rights to defense with regard to both the variation of the acts charged in the indictment as well as their legal classification.*"

²⁵⁵ Raxcacó Reyes v. Guatemala, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 1535: "In this case, the Guatemalan government sentenced Ronald Raxcacó Reyes, Jorge Mario Murga Rodríguez, and Hugo Humberto Ruiz Fuentes to death for the kidnapping of a minor. The Court discusses the conditions under which States can impose death penalty, as well as on conditions of detention in prisons."

²⁵⁶ López Álvarez v. Honduras, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 2053: "This case is about the harassment and judicial persecution of the leader of an organization of indigenous peoples in Honduras whose land was encroached upon and seized by foreign investors. Mr. Alfredo López Álvarez was a member of a Honduran Garifuna community. He was arrested for drug possession and illegal trafficking on April 27, 1997 and was acquitted of the charges in January of 2003, but remained in custody until August 2003."

*Montero Aranguren et al. v. Venezuela*²⁵⁷, and *Boyce et al. v. Barbados*²⁵⁸, those orders were partially complied by the State. And only in *Lori Berenson Mejía v. Peru*²⁵⁹, the IACourtHR archived the case file. In this latter case, the IACourtHR ordered that “the State should adopt immediately the necessary measures to adapt the detention conditions in the Yanamayo Prison to international standards and transfer any other prisoners who cannot be confined at the altitude of this prison owing to their health.”²⁶⁰ However, there was no full compliance with this issue. The IACourtHR only recognized the efforts of the State to improve the *prison environment*, but made it clear that “some aspects of the detention conditions at the Yanamayo prison have not been analyzed in the context of this Order [which]...does not prevent their future analysis in the context of other contentious cases.”

As could be observed in the cases presented above, the debate in the Inter-American system takes into consideration the *conditions of detention*, either incidentally or as the main issue. But invariably, in all those cases, the Inter-American bodies analyzed “the circumstances, objects, or conditions by which [inmates are] surrounded.”²⁶¹ This is the definition of the environment, as stated in Chapter 1. However, as the debate is entrenched with human rights issues, and the discussion takes place in a system for the

²⁵⁷ *Montero Aranguren et al. v. Venezuela*, Loyola of Los Angeles International and Comparative Law Review, v. 38, 2016, p. 1713: “This case is about a massacre committed by the guards of the Detention Center of Catia, in Caracas, Venezuela, while a military coup is taking place in the country. During the massacre sixty-three prisoners died, fifty-two were injured and twenty-eight disappeared. Living conditions at the prison, also known as “Hell”, were inhuman and degrading, and security personnel understaffed and unprepared. State admitted responsibility at first and then tried to argue its case unsuccessfully.”

²⁵⁸ *Boyce et al. v. Barbados*, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 1029: “This case is about the imposition of mandatory death sentence for the crime of murder on Lennox Ricardo Boyce and four more individuals. In addition, the State subjected the victims to uninhabitable prison conditions, and their warrants of execution were read while their complaints were still pending before domestic courts and the Inter-American human rights system.”

²⁵⁹ *Lori Berenson Mejía v. Peru*, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2015, p. 2609: “This case involves the arrest, conviction, and detention of Lori Helene Berenson Mejía, a United States citizen charged with treason for her alleged affiliation with the Tupac Amaru Revolutionary Forces..., she was arrested and...was subjected to inhumane detention conditions. On August 28, 2000, a new proceeding against Ms. Berenson Mejía was commenced in the ordinary criminal jurisdiction. This trial culminated in the judgment of June 20, 2001, which found Ms. Berenson Mejía guilty of the crime of “collaboration with terrorism,” and sentenced her to 20 years imprisonment. The Supreme Court of Justice of Peru confirmed the judgment on February 13, 2002. The Court found that the State violated the American Convention on Human Rights.”

²⁶⁰ *Lori Berenson Mejía v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004), paragraph 241.

²⁶¹ Merriam-Webster Dictionary, *supra* note 36.

protection of human rights, environmental issues are limited to the remedies designed for human rights questions. These limitations will be explored next chapter.

3.3. The limitation of the Inter-American System of protection of human rights in cases of conditions of detention

As seen in Chapter 3.2.2, yet the IACourtHR issues decisions with binding power, the enforcement mechanisms of the Inter-American system are still weak. Among all the mentioned cases, no one had full compliance regarding the issue of *conditions of detention*. And worse, at least in five cases, there was no compliance at all. The will of the State is the preponderant mechanism to promote compliance in the Inter-American System, in accordance with Article 68.1 of the American Convention: “The States Parties to the Convention undertake to comply with the judgment of the IACourtHR in any case to which they are parties.” However, if the State does not comply, do the IACourtHR, individuals, or the population, in general, have any mechanism to enforce it?

Yes. But mechanisms vary in type and intensity depending on the kind of redress that is required if individuals or a collectivity is affected, as well as if the rights are demanded in the regional system of protection of human rights or if they are required in the judicial branch of the concerned country.

The first sentence of Article 63.1 states that “[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.” This provision reveals the IACourtHR understanding that the “*restitutio in integrum*” is a principle to be followed in the Inter-American system, as stated in the landmark case *Factory at Chorzów*²⁶² of the Permanent Court of International Justice.²⁶³ Therefore, in

²⁶² *Factory at Chorzow* (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A), p. 47. “Le principe essentiel, qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale, notamment de la jurisprudence des tribunaux arbitraux, est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis.” (French, original). The essential principle, which derives from the very notion of an unlawful act and seems to emerge from international practice, in particular from the case law of arbitral tribunals, is that reparation must, as far as possible, erase all the consequences of the act unlawful and restore the state that would presumably have existed if the act had not been committed. (English translation).

²⁶³ Antkowiak, Tomas M. *et al.* The American Convention on Human Rights, *supra* note 191, p. 287. The author mentions the case *Factory at Chorzow*.

the sought for the “*restitutio in integrum*,” the IACourtHR can issue monetary and non-monetary measures, and also different forms of specific performance or structural measures.

The American Convention designs the path to be followed by individuals or groups in case a State does not comply with the IACourtHR’s ruling. Article 68.2 determines “[t]hat part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.” This provision is entirely appropriate when the case contains *individual claims* for pecuniary damages. In this situation, the compensation determined by the IACourtHR can be demanded in the judicial branch of the State. In this situation, the individual does not need to discuss the merits of the case again, but only to require the amount determined by the IACourtHR. The decision then takes effect within a sovereign State, and not only in the Inter-American System.

In Brazil, for instance, the statute that establishes the civil procedure framework is the Federal Law 13.105/2015, as known as the Civil Procedure Code.²⁶⁴ The IACourtHR decision is not included in its Article 515 as a judicial title ready to be enforced, but it at least can be understood as “all other titles to which, by express provision, the law assigns executive force,” as determined by Article 784, XII of the same legal instrument. By consequence, Article 910 establishes the procedures to any individual or group to execute the IACourtHR decision that stipulates *compensatory damages* against the State according to Article 68.2 of the American Convention. The plaintiff then has only to bring a copy of IACourtHR’s decision and the amount granted to file the case. Besides, Mazuolli quoting Piovesan refers that “the non-compliance with a decision of the Inter-American Court ensures that the victim has the right and the Federal Prosecution has the institutional duty to take legal action to enforce the judgment.”²⁶⁵

²⁶⁴ Brazil. Civil Procedure Code, available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm, last accessed on 09 September 2019.

²⁶⁵ Mazuolli, Valério O. and Teixeira, Gustavo. F. International Environmental Law and the Greening of the American Convention on Human Rights, *Anuario Mexicano de Derecho Internacional*, v. 13, 2013, p. 193, quoting Piovesan, Flávia, *Direitos humanos e o direito constitucional internacional*, 7a. ed., São Paulo, Saraiva, 2006, pp. 339-341.

However, in cases related to the *conditions of detention*, the necessary remedies involve non-pecuniary measures. The IACourtHR issues a *specific performance* measure or a *structural measure* determining the State to improve the conditions of detention in the whole country, or in a particular prison, detention center, police station, etc. There's always the need for a State's positive action to redress for the conditions of detention, which includes the need to allocate money and human resources to the affected location. In these situations, governments must rethink policies and priorities to satisfy international human rights standards. This is exactly the feature that brings *conditions of detention* closer to economic and social rights than to civil and political rights, and that relegates it to a lower level of compliance and enforcement due to the "progressive development" foreseen in Article 26 of the American Convention.

Different from Chapter II of the American Convention that sets forth and specifies numerous civil and political rights with immediate binding powers in 23 Articles, Chapter III – in its sole Article 26 – generically mentions the economic, social, and cultural rights to be progressively achieved.²⁶⁶ Although a strong line cannot be made separating the nature of civil and political rights of the economic and social rights, the issue *conditions of detention* is in a gray area because it comprises the rights to humane treatment, life, and health on one side, and the right to a healthy environment on the other.²⁶⁷

So the paradox is established: if on the one hand it is expected that States immediately respect the "civil and political rights nature" of the *conditions of detention*, on the other hand, it is merely required a "progressive achievement" when it comes to its "economic and social rights nature." This duality demonstrates the two categories of the concept *conditions of detention*: (1) *Conditions of detention stricto sensu*, that refers to the conditions of detention inflicted to a specific individual in violation of its civil and

²⁶⁶ American Convention on Human Rights, *supra* note 110, Article 26. "States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

²⁶⁷ See Orellana, Marcos. Habitat for Human Rights: environmental degradation and human rights: keynote address: 15th Annual Vermont Law Review Symposium: Habitat for Human Rights, Vermont Law Review, v. 40, p. 436. See also Acevedo, Marina. The intersection of Human Rights and Environmental Protection in the European Court of Human Rights, New York University Environmental Law Journal, v. 8, p. 438. While Orellana argues that the right to a healthy environment is included among economic and social rights, Acevedo suggests that the right to live in an environment of quality is derived of civil and political rights.

political rights;²⁶⁸ (2) *Prison environment*, which are the conditions of detention in a specific country, prison, detention center, police station, in violation non-individual economic and social rights.²⁶⁹ Nevertheless, the IACHR and the IACourtHR still do not make the difference between *conditions of detention stricto sensu* and *prison environment* in their reasonings.

The paradox is reflected in the American Convention when it comes to enforcement measures. The American Convention has a political tool in the Inter-American system for the protection of human rights in the case that a State does not comply with the IACourtHR's decisions. However, the Convention apparently does not establish a method to enforce economic and social rights in the judicial branch of the States, especially when it contemplates the rights of a collectivity, which is the case of the *prison environment*.

The political tool is in Article 65 of the American Convention permits “the Court...submit, for the Assembly’s consideration...the cases in which a state has not complied with its judgments, making any pertinent recommendations.” In those situations, the General Assembly of the OAS can bring the issue to the discussion, and even “has the discretionary authority to pass sanctions against [the] State...; [however] [t]he General Assembly has not always been inclined to exercise these enforcement powers.”²⁷⁰

On the other hand, Article 68.2 only allows the execution in the country of the “part of a judgment that stipulates compensatory damages.”²⁷¹ This is coherent with the idea of an immediate binding power conferred to civil and political rights – focused on the individual and in compensation – contrasted with the “progressive development” to economic and social rights, which requires specific performance in favor of a collectivity.

²⁶⁸ See, for example, the IACHR Resolution 53/19, PM 289/19 (*Héctor Armando Hernández Da Costa, Venezuela*). In this case, the IACHR granted precautionary measures in favor of Héctor Armando Hernández da Costa to guarantee his rights to life, personal integrity and health, particularly in relation to the lack of adequate and timely medical attention.

²⁶⁹ As the cases mentioned in Chapters 3.2.1 and 3.2.2.

²⁷⁰ Shaver, Lea. The Inter-American Human Rights System, *supra* note 200, p. 664.

²⁷¹ American Convention on Human Rights, *supra* note 110, Article 68.2.

Therefore, either by the weak political tool to submit the case to the General Assembly or by the apparent impossibility to enforce specific performance determined by the IACourtHR's judgments in the judicial branches of the countries, the Inter-American System shows its limitations. Gina Donoso writes about these restrictions going even further, stating an absolute inexistence of juridical methods of enforcement, affirming that "[t]he I-ACourtHR can apply international laws, but it does not have any specific juridical method to make States fulfill its orders, just political ones. It is indispensable to fortify the real impact of the role of this international tribunal and the supervision mechanisms."²⁷²

That is the main concern in cases related to the *prison conditions*, where a collectivity is affected, and rights with economic and social nature are at stake: How is it possible to fortify the Inter-American System using juridical methods to make States fulfill IACourtsHR's orders especially when social and economic collective rights related to prison conditions are at stake? There is an evident "lack of prisoners' human rights protection [that] invites the need for a stronger Inter-American human rights system to effectively address the pervasive human rights violations against prisoners in Latin America."²⁷³ And the next chapter will discuss juridical ideas to enhance the enforceability in cases of *prison environment* in the Inter-American system.

²⁷² Donoso, Gina. Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach, *Revista do Instituto Interamericano de Derechos Humanos*, v. 49, p. 61.

²⁷³ Barberena, Yesenia Judith. Prisoners in Latin America: What the Inter-American Human Rights system can do to protect prisoners' human rights, *George Washington International Law Review*, v. 47, p. 703.

CHAPTER FOUR. JUSTICIABILITY AND ENFORCEABILITY OF ENVIRONMENTAL RIGHTS IN PRISONS IN THE INTER-AMERICAN SYSTEM.

The previous chapter raised the topic of limitations of the Inter-American System to redress for economic and social rights and, consequently, to issues related to *conditions of detention*. While the Inter-American System has been an effective mechanism to avoid violations of civil and political rights of individuals or groups of individuals, it has been struggling to become more effective when it deals with economic and social rights, and with collective rights. However, the principle of “*restitutio in integrum*” from Article 63 and the “progressive development” from Article 26 of the American Convention are pushing the IACourtHR to issue decisions granting the plaintiffs social and economic rights, even when they belong to a collectivity.²⁷⁴

With that idea of progress in mind, which is also boosted by the principle of non-regression, where States assume the responsibility to “not scale back their level of protection but incrementally move them forward,”²⁷⁵ the IACourtHR not only has been granting justiciability to economic, social, and collective rights,²⁷⁶ but is also developing the concept to the right of a healthy environment as an autonomous right extracted from the American Convention.²⁷⁷

And more, as affirmed above, the issue *conditions of detention* have characteristics of civil, political rights, and individual rights, as well as of economic, social rights, and collective rights. This latter nature can be named *prison conditions*. Although *prison conditions* are essentially environmental discussion merely linked to human rights issues, the focus of the debate in the cases before the Inter-American system is only human rights violations.

The focus in the human rights violation is comprehensible, considering the discussion is taking place in a system for the protection of human rights. However,

²⁷⁴ Antkowiak, Tomas M. *et al.* The American Convention on Human Rights, *supra* note 191, p. 15-20. The author recalls that the IACourtHR has a “tendency to incorporate international legal instruments” in order to interpret the scope define the contours of the American Convention, quoting cases where the ILO Convention was used to assess indigenous right to property. Also, the author notes that Article 63 of the American Convention allows a full “full range of reparation”, either to individual or to collective rights.

²⁷⁵ Orellana, Marcos. Habitat for Human Rights *supra* note 267, p. 435.

²⁷⁶ *Id.*, p. 434.

²⁷⁷ Inter-American Court of Human Rights. Advisory Opinion OC-23/17, *supra* note 12.

considering (1) the issue *conditions of detention* also has an environmental nature that can be called *prison environment*; (2) the growing approximation between human rights and environment; (3) the door opened by Ksentini – as presented in chapter 2.2 – to consider prisoners subject of special attention regarding environmental hazards; (4) the tendency of the IACourtHR to accept the discussion of environmental issues in the human rights system, this thesis proposes that the discussion shifts from a human rights to an environmental approach, in a movement suggested by Shelton,²⁷⁸ when the author states the interchangeability between the human rights approach and the environmental approach. With this change of approach, the expression *conditions of detention* better fit in the discussion as *prison environment*.

4.1. Justiciability of environmental rights in the Inter-American System

Environmental rights do not fit perfectly in the category of civil and political rights, nor economic and social rights. Although the distinction between the rights of liberty and welfare rights is not essential in the Universal Declaration of Human Rights,²⁷⁹ the human rights treaties that were built upon the UDHR reflected the different political approaches at a time when world was facing the Cold War,²⁸⁰ and two documents were enacted: the International Covenant on Civil and Political Rights²⁸¹ (ICCPR), and the International Covenant on Economic, Social and Cultural Rights²⁸² (ICESCR). The ICCPR's provisions are related to negative rights, that "prohibit state interference or coercion,"²⁸³ such as the right to free speech, freedom of religion, right to life, or not to be subjected to torture or cruel, inhuman or degrading treatment. On the other hand, the ICESCR's provisions focus on positive rights, "which place a duty on the state to take

²⁷⁸ Shelton, Dinah. Human Rights, Environmental Rights, and the Right to Environment. *Stanford Journal of International Law*, v. 28, n. 1, Fall 1991, p. 105.

²⁷⁹ Universal Declaration of Human Rights, *supra* note 105.

²⁸⁰ Alston, P. & Goodman, R., *International Human Rights*, *supra* note 1, p. 142.

²⁸¹ International Covenant on Civil and Political Rights, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last accessed on 07 October 2019.

²⁸² *Id.*

²⁸³ Boyd, David R. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*. UBC Press, 2012, p. 23.

action (and expend resources)”²⁸⁴ to fulfill those rights, such as health care, education, and housing.

The nature of the right to a healthy environment does not allow scholars to fit it in one of those two categories. Environmental rights have “the ability to bring together under one single umbrella the normative content of the variegated rights affected by environmental harm.”²⁸⁵ At the same time, environmental rights “transcend the conventional binary classification of human rights, [showing] “both individual and collective aspects.”²⁸⁶ These characteristics prompted scholars to develop the idea that environmental rights are third generation rights, focused on solidarity and collectivity, such as peace, development, and democracy.²⁸⁷ However, this generational view is also controversial and does not seem to be helpful²⁸⁸ considering the current understanding of the international community since the 1993 United Nations Vienna Declaration and Program of Action, which stated that “[a]ll human rights are universal, indivisible and interdependent and interrelated [and that human rights] must [be] treated...in a fair and equal manner, on the same footing, and with the same emphasis.”²⁸⁹

So, adopting the idea that environmental rights bring together in one single umbrella²⁹⁰ rights of different natures depending on the rights affected, it can reveal elements of civil or political rights in one situation, as well as an economic and social aspects in others. Also, environmental rights can be considered individually or collectively, depending on the range of people affected. The multiplicity of natures of environmental rights is particularly evident when the issue *conditions of detention* is under analysis, which allows the identification of two different categories under the same concept: *conditions of detention stricto sensu* and *prison conditions*, depending on the

²⁸⁴ *Id.*

²⁸⁵ Orellana, Marcos. Habitat for Human Rights *supra* note 267, p. 436.

²⁸⁶ Boyd, David R. The Environmental Rights Revolution, *supra* note 283, p. 25.

²⁸⁷ See Engle, Eric. Universal Human Rights: A generational story, *supra* note 4. See also Sayto, Natso T. Colloquium Proceedings, *supra* note 4.

²⁸⁸ Boyd, David R. The Environmental Rights Revolution, *supra* note 283, p. 22.

²⁸⁹ Vienna Declaration and Programme of Action, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, last accessed on 07 October 2019.

²⁹⁰ Orellana, Marcos. Habitat for Human Rights *supra* note 267, p. 436.

sort of rights affected. As affirmed in chapter 3.3, *conditions of detention stricto sensu* deal with individual, civil, and political rights, while *prison conditions* are related to collective, economic, and social rights.

When it comes to the economic and social nature of environmental rights, justiciability is a significant issue. Are economic and social rights enforceable? Particularly concerning the *conditions of detention*, can those rights be adjudicated by the courts when the issue is their economic and social nature (*prison conditions*)?

Sunstein²⁹¹ brings the traditional view stating that economic and social rights are “‘nonjusticiable’ – not subject to judicial enforcement – when they call for large-scale interference with the operation of free markets, or when they call for managerial tasks not within judicial competence.” Boyd²⁹² points out some arguments to the defenders of the traditional view: economic and social rights [1] “would subvert democracy by allowing judges to substitute their opinion for elected legislator; [2] the judicial system lacked the capacity to resolve complex, polycentric disputes; and [3] the concept of social, economic and environmental rights are too vague.”²⁹³ The traditional understanding of economic and social rights is one of the reasons that inspired the United Nations to draft two separate covenants. According to the annotations on the Text of the Draft International Covenants on Human Rights,

[t]hose in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an “absolute” character, while economic, social and cultural rights were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual “against” the State, i.e., against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote. Since the nature of civil and political rights and that of economic, social and cultural rights, and the obligations of the State in respect thereof, were different, it was desirable that two separate instruments should be prepared.²⁹⁴

²⁹¹ Sunstein, Cass R. *Against Positive Rights*. University of Chicago Law School Chicago Unbound, 1993, p. 38.

²⁹² Boyd, David R. *The Environmental Rights Revolution*, supra note 283, p. 37.

²⁹³ *Id.*

²⁹⁴ United Nations. *Annotations on the Draft International Covenants on Human Rights*, available at documents-dds-ny.un.org/doc/UNDOC/GEN/N55/173/02/PDF/N5517302.pdf?OpenElement, last accessed on 09 October 2019.

The traditional view was also reflected in the American Convention.²⁹⁵ While the regional human rights binding treaty specified civil and political rights from articles 3 to 25, it did not show the same level of detail to economic and social rights seen in the non-binding American Declaration.²⁹⁶ In fact, the American Convention has relegated economic, social, and cultural rights to Article 26 under the title “progressive development,” establishing the states parties’ duties only to “adopt measures...with a view to achieving progressively... the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States.”²⁹⁷ It reflects the understanding not only that economic, social, and cultural rights are “nonjusticiable,” but also that the international bodies should not interfere in these matters to preserve the sovereignty of the States parties that would have “the right to choose how to allocate scarce resources.”²⁹⁸ Cavallaro and Shaffer,²⁹⁹ for instance, affirm that economic, social, and cultural rights under the American Convention show no specific basis for state responsibility, and have enforceability issues.”

However, considering the understanding of the United Nations since the 1993 Vienna Declaration that all human rights are interdependent, must be treated equally, on the same footing, and with the same emphasis,³⁰⁰ economic and social rights are growing in importance. The modern view is that civil and political rights can only be achieved when and where economic and social rights are respected³⁰¹ and vice-versa.

The Inter-American system of protection of human rights traditionally provides to collective, economic, and social rights monitoring tools provided by the IACHR, such as country reports, annual reports, thematic reports, country visits, issuing of

²⁹⁵ American Convention on Human Rights, *supra* note 110.

²⁹⁶ American Declaration of the Rights and Duties of Man, *supra* note 185.

²⁹⁷ American Convention on Human Rights, *supra* note 110, Article 26.

²⁹⁸ Bol, Jennifer. Using International Law to Fight Child Labor, *supra* note 188, p. 1215.

²⁹⁹ Cavallaro, J.L. and Shaffer, E. J. Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas, *Hastings Law Journal*, 2004, p. 267.

³⁰⁰ Vienna Declaration and Programme of Action, *supra* note 289.

³⁰¹ Bol, Jennifer. Using International Law to Fight Child Labor, *supra* note 188, p. 1215.

recommendations, overseeing state compliance,³⁰² reserving the individual petition system to individual cases. However, gradually, the IACHR and the IACourtHR started paving the way to economic and social rights to be justiciable in the Inter-American system, when they are connected to individual rights protected by the American Convention.

Since 1985, the IACHR started to acknowledge collective rights in cases related to indigenous peoples such as in the Yanomami case,³⁰³ where “the IACHR first established a link between environmental quality and the right to life,”³⁰⁴ as well as liberty, and personal security, the right to residence and movement, and the right to the preservation of health and to well-being, all under the American Declaration.³⁰⁵ After that, in cases such as *Yakye Axa Indigenous Community v. Paraguay*³⁰⁶ and *Sawhoyamaya Indigenous Community v. Paraguay*,³⁰⁷ the IACourtHR ruled in favor of a whole community due to state’s violations of rights under the American Convention. In those cases, recalling the principle of “*restitution in integrum*,” besides monetary damages, the IACHR imposed specific measures forcing the states to act to guarantee their collective, economic and social rights, as a manner to redress for the individual rights violated.³⁰⁸

³⁰² Organization of the American States website. IACHR, *supra* note 170.

³⁰³ Organization of the American States website. IACHR, Resolution N° 12/85, Case N° 7615, Brazil, March 5, 1985, available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>, last accessed on 14 October 2019. In this case the IACHR established that rights the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI) were affected by: (1) the construction of a highway through the territory where the Indians live; (2) the failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian group; (3) the authorization to exploit the resources of the subsoil of the Indian territories; (4) the permission to the massive penetration into the Indians' territory of outsiders carrying various contagious diseases that have caused many victims within the Indian community and by (5) the lack of the essential medical care to the persons affected; and finally, (6) by the displacement the Indians from their ancestral lands, with all the negative consequences for their culture, traditions, and costumes.

³⁰⁴ Boyd, David R. The Environmental Rights Revolution, *supra* note 283, p. 97.

³⁰⁵ Organization of the American States website. IACHR, Resolution N° 12/85, *supra* note 303.

³⁰⁶ *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, (Merits, Reparations and Costs), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf, last accessed on 14 October 2019.

³⁰⁷ *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of March 29, 2006, (Merits, Reparations and Costs), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf, last accessed on 14 October 2019.

³⁰⁸ In *Sawhoyamaya Indigenous Community v. Paraguay*, the IACourtHR order the State to “adopt all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaya Community their traditional lands, within three years...; to implement a community

Following this trend, the 1988 Additional Protocol on Economic, Social, and Cultural Rights entered into force in 1999, with 16 ratifying states in 2019.³⁰⁹ The so-called Protocol of San Salvador, grounded in the “progressive achievement,” specifies rights from Article 6 to 18, such as the rights to work, social security, health, healthy environment, food, education, culture, protection of the family, children, elderly, and handicapped. The Additional Protocol is an essential achievement for the protection of economic, social, and cultural rights in the American hemisphere. However, the treaty appears to limit the justiciability of those rights to two categories: trade union rights and the right to education, since Article 19.6 establishes that those rights “may give rise...to the application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights,”³¹⁰ without mentioning any other right established in the Protocol of San Salvador.

Although the justiciability of economic and social rights cannot be extracted directly from the Protocol of San Salvador – with the exception of the trade union rights and right to education – once states ratify international treaties, they must be interpreted in the way to provide as much effectiveness as possible, in accordance with the interpretative directions provided by Article 29 of the American Convention.³¹¹ In that case, four factors must be taken in consideration: (1) human rights are universal, indivisible, interdependent and interrelated and must be treated in an equal manner, on the same footing, and with the same emphasis;³¹² (2) the achievement of civil and political

development fund...; to deliver to [the community] the basic supplies and services necessary for their survival. In *Yakye Axa Indigenous Community v. Paraguay* the IACourTHR ruled that “the State must provide [the community] with the basic services and goods required for their subsistence, [and also that] the State must implement a community development fund and program, for example.

³⁰⁹ Additional Protocol to the American Convention on Human Rights, *supra* note 13. According to the OAS website, 16 states ratified or acceded to the Protocol: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.

³¹⁰ *Id.*, Article 19.

³¹¹ American Convention on Human Rights, *supra* note 110, Article 29 (a). The text of the provision prescribes: No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

³¹² Vienna Declaration and Programme of Action, *supra* note 289.

rights are closely tied to respect for economic and social rights;³¹³ (3) the principle of “*restitutio in integrum*” prescribes that any injured party must be ensured of the enjoyment of his right or freedom that was violated with the appropriate remedy,³¹⁴ (which means, in cases of environmental hazards, for instance, the restoration of the affected environment); (4) economic and social rights “are found in constitutions, legislations, and national jurisprudence of American states”³¹⁵ and are adjudicated by national courts as much as civil and political rights are.³¹⁶

That being said, economic and social rights cannot be treated as a lower-level set of rights in comparison with civil and political rights, and they deserve to be enforceable not only to achieve their own welfare goals but also to help individuals to exercise their civil and political rights. Also, in the name of the principle of “*restitutio in integrum*,” the justiciability of economic and social rights must be affirmed at the international level grounded on the work developed by national courts, as it will be seen in chapter 4.2, in which Brazil is an example. The justiciability implies not only access to the courts but also that the courts will provide the appropriate remedy to assure the enjoyment of the violated right. It means that courts should issue orders, specific performance measures, determining states to expend resources to redress for the violation of an economic and social right.

So, even when the violated right is related to the economic and social nature of the environmental right – such as the case of *prison conditions* – there is a justiciable right. However, at the international or regional level, the justiciability directly relies on the national legal framework in two instances. First, to theoretically reaffirm the justiciability of economic and social rights as accepted by national constitutions, legislations, and courts, in which Brazil is an example. Second, to reinforce the principle of “*restitutio in*

³¹³ Bol, Jennifer. Using International Law to Fight Child Labor, *supra* note 188, p. 1216.

³¹⁴ American Convention on Human Rights, *supra* note 110, Article 63.1.

³¹⁵ Melish, Tara J. Rethinking the “Less as more” thesis: Supranational litigation of economic, social, and cultural rights in the Americas. *New York University Journal of International Law and Politics*, v. 39, p. 275.

³¹⁶ *Id.*, p. 280.

integrum” by the possibility of enforceability of the IACourtHR decisions in national courts.

4.2. Brazilian environmental framework and the Inter-American Court of Human Rights Advisory Opinion OC-23/17 as an affirmation of the justiciability and enforceability of environmental rights.

As mentioned in Chapter 1.1, the Brazilian Constitution shows several provisions related to the environment, which made scholars identify four aspects of the environment: natural, artificial, cultural and workplace environment.³¹⁷ Also, several statutes grounded on the Articles of the Brazilian Constitution confer to the legal system a very robust framework of protection of the environment.

The National Environmental Policy³¹⁸, for instance, defines environment as “the set of physical, chemical and biological conditions, laws, influences and interactions that permits, houses and governs life in all its forms,”³¹⁹ and describes pollution as “the degradation of environmental quality resulting from activities that directly or indirectly [among other things], harm the health, safety and welfare of the population...[and] affect the aesthetic or sanitary conditions of the environment.”³²⁰ Several other statutes establish provisions regarding different aspects of environmental law, such as the Brazilian Forest Code,³²¹ Environmental Crimes Law,³²² Law of Fauna,³²³ National Water Resources

³¹⁷ Fiorillo, Celso Antonio Pacheco. Curso de direito ambiental brasileiro, *supra* note 51.

³¹⁸ Brazil. Federal Law 6938/1981, available at www.planalto.gov.br/ccivil_03/LEIS/L6938.htm, last accessed on 18 October 2019.

³¹⁹ *Id.*, Article 3.

³²⁰ *Id.* Article 3. III, (a) and (d).

³²¹ Brazil. Federal Law 12.651/2012, available at www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12651.htm, last accessed on 18 October 2019.

³²² Brazil. Federal Law 9605/1998, available at www.planalto.gov.br/ccivil_03/leis/19605.htm, last accessed on 18 October 2019.

³²³ Brazil. Federal Law 5197/1967, available at www.planalto.gov.br/ccivil_03/leis/L5197compilado.htm, last accessed on 18 October 2019.

Policy,³²⁴ National System of Nature Conservation Units,³²⁵ and the Agricultural Policy.³²⁶

The Brazilian environmental framework relies on remedies such as class actions, considering the collective nature of the environmental rights, which is called “collective civil jurisdiction”³²⁷ based in two statutes: the Consumer Protection Code³²⁸ and the Public Civil Action Statute.³²⁹ Both statutes provide an extensive list of plaintiffs that can file a public civil action grounded on environmental harms³³⁰ that are not only the individuals directly affected by the harm, such as the prosecutor’s or the public defender’s offices, for example. The statutes also bring provisions that enhance access to justice, such as the waiver of legal costs and reversal of the burden of proof.³³¹ And, besides the public civil action, the popular action³³² “enables anyone eligible to vote to file a legal action, free of costs, challenging any government act or omission that could harm the environment.”³³³

³²⁴ Brazil. Federal Law 9433/1997, available at www.planalto.gov.br/ccivil_03/LEIS/L9433.htm, last accessed on 18 October 2019.

³²⁵ Brazil. Federal Law 9985/2000, available at www.planalto.gov.br/ccivil_03/LEIS/L9985.htm, last accessed on 18 October 2019.

³²⁶ Brazil. Federal Law 8171/1991, available at www.planalto.gov.br/ccivil_03/LEIS/L8171.htm, last accessed on 18 October 2019.

³²⁷ Fiorillo, Celso Antonio Pacheco. *Curso de direito ambiental brasileiro*, *supra* note 51, p. 649.

³²⁸ Brazil. Federal Law 8078/1990, available at www.planalto.gov.br/ccivil_03/leis/l8078.htm, last accessed on 18 October 2019.

³²⁹ Brazil. Federal Law 7347/1985, available at www.planalto.gov.br/ccivil_03/leis/L7347orig.htm, last accessed on 18 October 2019.

³³⁰ *Id.*, Article 5. The following plaintiffs are entitled to file the Public Civil Action and requires Precautionary Measures: (1) Prosecutor’s Office; (2) Public Defender’s Office; (3) Federal Union, States, Federal District and the Cities; (4) State agencies and companies; (5) Associations that are existent for at least one year and include, among its institutional purposes, the protection of public and social heritage, the environment, the consumer, the economic order, free competition, the rights of racial, ethnic or religious groups or the artistic, aesthetic, historical, tourist and landscape.

³³¹ Brazil. Federal Law 8078/1990, Article 6, VIII, *supra* note 328. Also, the Brazilian Superior Court of Justice (STJ) ruled in its Precedent 618, that the reversal of the burden of proof is applicable to cases involving environmental harm.

³³² Brazil. Federal Law 4717/1965, available at www.planalto.gov.br/ccivil_03/LEIS/L4717.htm, last accessed on 18 October 2019.

³³³ Boyd, David R. *The Environmental Rights Revolution*, *supra* note 283, p. 131-132.

This comprehensive set of constitutional provisions and statutes, along with the work of courts and scholars, created a robust legal framework dedicated to the protection of the environment in Brazil, with great enforceability. The Brazilian framework “have contributed to ‘the development of a veritable juridical subsystem, whereby new laws are guided by the idea of collective protection of rights....’”³³⁴ Brazilian courts, then, not only accept the enforceability of the environmental rights in its economic and social nature but also provide them strong enforceability. McAllister states that “prosecutors and courts...helped develop a robust, effective environmental regulatory system in Brazil [that] brought a degree of legal fidelity and sanctioning power that environmental agencies lacked, and prosecution of environmental cases worked to dispel the longstanding notion of impunity for environmental harm.”³³⁵

Therefore, the Inter-American system of human rights’ protection finds in the Brazilian legal system the theoretical basis for understanding how environmental rights – even in their economic and social nature – are naturally justiciable and enforceable. Supporting the lack of justiciability and enforceability of economic and social rights is to ignore the principle of “*restitution in integrum*,” which means for environmental law to recover the affected environment. Monetary compensation would never be enough reparation for environmental harms, especially considering the Beck risk society.

Beyond the evident injuries explained by the natural sciences – with focus on the chemical, biological, and technological aspects – Beck states that environmental harms bring together social, cultural, and political issues that frequently remain hidden by the natural sciences approach.³³⁶ Environmental harms “can no longer be limited in time”³³⁷ and space, they are unsuitable to traditional accountability, which makes it “impossible to compensate those whose lives have been touched by those hazards.”³³⁸ Thus, limiting the remedies for environmental harms to monetary compensation is an explicit violation

³³⁴ *Id.*

³³⁵ McAllister, L. K. *Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, Stanford University Press, 2008, p. 2.

³³⁶ Beck, Ulrich. *Risk Society: Towards a New Modernity*, *supra* note 18, p. 24.

³³⁷ *Id.*, p. 2.

³³⁸ *Id.*

of the “*restitutio in integrum*” that is a principle to be followed in the Inter-American system of protection of human rights according to the IACourtHR.³³⁹

In addition, the search for the appropriate compensation for environmental harms has been strengthening after 2018. In the wake of the constant approximation between human rights and the environment, the IACourtHR published the Advisory Opinion OC-23/17 from November 15, 2017. In this Advisory Opinion, the IACourtHR was asked by the Republic of Colombia to interpret environmental standards regarding the effects on the marine environment in the Wider Caribbean Region.”³⁴⁰ The IACourtHR recognized an autonomous right to a healthy environment under the American Convention that, “unlike other rights, protects the components of the environment...even in the absence of the certainty or evidence of a risk to individuals.”³⁴¹ The IACourtHR also recognized that “[t]he human right to a healthy environment has been understood as a right that has both individual and also collective connotations,”³⁴² that “should also be considered...included among the economic, social and cultural rights protected by Article 26 of the American Convention.”³⁴³

The IACourtHR went beyond and affirmed the justiciability of those rights stating that environmental rights “should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities.”³⁴⁴ That is a direct assertion of the justiciability of environmental

³³⁹ Antkowiak, Tomas M. *et al.* The American Convention on Human Rights, *supra* note 191, p. 287. The author mentions the case *Factory at Chorzow*.

³⁴⁰ Inter-American Court of Human Rights. Advisory Opinion OC-23/17, *supra* note 12, p. 4. The IACourtHR was asked to determine [1] how the Pact of San José should be interpreted when there is a danger that the construction and operation of major new infrastructure projects may have severe effects on the marine environment in the Wider Caribbean Region and, consequently, on the human habitat that is essential for the full enjoyment and exercise of the rights of the inhabitants of the coasts and/or islands of a State Party to the Pact, in light of the environmental standards recognized in international customary law and the treaties applicable among the respective States; [and 2] how the Pact of San José should be interpreted in relation to other treaties concerning the environment that seek to protect specific areas, such as the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region, in the context of the construction of major infrastructure projects in States that are party to such treaties, as well as the respective international obligations concerning prevention, precaution, mitigation of damage, and cooperation between the States potentially affected.

³⁴¹ *Id.*, p. 27.

³⁴² *Id.*, p. 26.

³⁴³ *Id.*, p. 25.

³⁴⁴ *Id.*, p. 25.

rights, as well as any other economic, social, and cultural rights. This understanding raised divergences in two concurring opinions from Judges Eduardo Vio Grossi and Humberto Antonio Sierra Porto that, despite the divergence served to reinforce the majority opinion in favor of the justiciability of those rights. Judge Porto affirmed that

[b]y incorporating considerations on the direct justiciability of the right to a healthy environment, in particular, and of economic, social and cultural rights, in general, the majority exceed the purpose of the Advisory Opinion, without granting those intervening in the processing of the Advisory Opinion any opportunity to present arguments for or against this position.³⁴⁵

On the same path, Judge Grossi affirmed that

...on the one hand, [economic and social rights] may be adjudicated before the domestic courts of the States Parties to the Convention if this is established in their respective domestic laws and, on the other, when interpreting the Convention an effort should be made not to leave any margin for the possible perception that the principle that no State can be taken before an international court without its consent would be altered.³⁴⁶

The justiciability of economic and social rights in general, and of environmental rights in specific, is grounded on the “*pro persona*” principle of Article 29 of the American Convention and is not undermined by the concurring opinion of Judges Porto and Grossi. On the contrary, Judge Porto only attacks the justiciability on procedural grounds stating the Advisory opinion should not be used to that intent; and Judge Grossi affirms the possibility of adjudication before the domestic courts of the States parties if this is established in their domestic laws, and if the State accepts the IACourtHR jurisdiction.

If we would compare the comments above to Brazil’s legal system, we could notice that the country fulfills both requirements. First, as mentioned in chapter 1.1, Brazilian Constitution states the right of a healthy environment in its four aspects: natural, artificial, cultural and workplace environment,³⁴⁷ which spreads its influence along several statutory provisions that protect substantial and procedural environmental rights,³⁴⁸ and also in the jurisprudence, that not only accepts the justiciability but provides

³⁴⁵ *Id.*, Concurring Opinion of Judge Humberto Antonio Sierra Porto, paragraph 7.

³⁴⁶ *Id.*, Concurring Opinion of Judge Eduardo Vio Grossi, paragraph 4.

³⁴⁷ Fiorillo, Celso Antonio Pacheco. Curso de direito ambiental brasileiro, *supra* note 51.

³⁴⁸ See *supra* notes 318 to 332.

to environmental law strong enforceability.³⁴⁹ Second, Brazil ratified both the American Convention³⁵⁰ and the Additional Protocol of San Salvador³⁵¹ and accepted the jurisdiction of the IACourtHR.³⁵² That means that none of the restrictions imposed by the concurring opinions would serve to impair the justiciability or the enforceability of economic and social rights in general, and environmental rights in particular.

So, theoretically, regional and national systems influence each other supporting and reaffirming human rights and their means of protection. In a complex and plural post-modern world that shows aspects of a risk society,³⁵³ legal systems must be interpreted with an eye on each other and must engage in a dialogue to find the best solution for a specific issue of law. Marques, recalling the theory of the “*dialogue des sources*,” affirms that

Erik Jayme warns us that, in today's postmodern times, plurality, complexity, the imposing distinction of human rights, and the ‘droit à la différence’ (right to be different and to be treated differently...) no longer allow this kind of clarity or ‘mono-solution’. The current or postmodern solution is systematic and topical at the same time because it must be more fluid, more flexible, allowing greater mobility and fineness of distinctions.³⁵⁴

In order to both systems to interact, Marques proposes three approaches: (1) simultaneous application of the two systems, in which one may serve as conceptual basis for the other; (2) coordinated application of the two systems, in which one may complement the application of the other; and (3) dialogue of reciprocal influences.³⁵⁵ This “dialogue” is already taking place between the Inter-American System and the Brazilian legal system, and it also can happen between the regional system and other national systems that give environmental rights constitutional status. The Brazilian Federal

³⁴⁹ Brazil. Federal Supreme Court. ADI 3540-MS/DF, *supra* note 58, p. 37

³⁵⁰ American Convention on Human Rights, *supra* note 110.

³⁵¹ Additional Protocol to the American Convention on Human Rights, *supra* note 13.

³⁵² Organization of the American States website. Multilateral Treaties, American Convention on Human Rights, “Pact of San Jose, Costa Rica”, *supra* note 196.

³⁵³ Beck, Ulrich. Risk Society: Towards a New Modernity, *supra* note 18.

³⁵⁴ Marques, Claudia Lima. Superação das Antinomias pelo Diálogo das Fontes: O Modelo Brasileiro de Coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002, Revista da ESMESE, n. 7, 2004, p. 43.

³⁵⁵ *Id.*, p. 45-46.

Supreme Court, for instance, accepted the conventionality control (“controle de convencionalidade”) in 2008,³⁵⁶ which converts every single judge in national courts in an Inter-American judge that controls the suitability of national statutes to the American Convention and its Protocols.^{357 358}

Therefore, theoretically, the Brazilian legal framework serves to reaffirm justiciability of economic and social rights in general, and environmental law in particular before the Inter-American System; at the same time, the regional system serves to empower constitutional and statutory provision as well as to help national courts decisions in the enforcement of economic and social rights in general and environmental rights in particular. The next chapter will discuss how this theory could work in practical matters.

4.3. Justiciability and enforceability of environment rights found by the Inter-American Court of Human Rights in judgment on the merits in Brazilian Courts.

The Inter-American System and national legal systems cannot be understood as two separate and incommunicable systems. The American Convention provided conceptual development for the human rights in the hemisphere at the same time IACHR and IACourtHR empowered themselves over time as indispensable institutions for human rights protection. The influence of the Inter-American System is such that national authorities and institutions can no longer ignore their decisions and – more – they must work together with the IACHR and the IACourtHR to promote human rights in their territories.

Considering this ongoing empowerment, the Inter-American System should engage in a “*dialogue des sources*” with national systems in order to reinforce principles of the American Convention such as the “*restitutio in integrum*,” particularly when environmental rights are at stake; the “progressive achievement” for economic and social rights, directed to executive, legislative, and judicial branches; and the “*pro persona*”

³⁵⁶ Brazil. Federal Supreme Court. RE 466343, available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=2343529>, last accessed on 21 October 2019.

³⁵⁷ Piovesan, Flávia. *Direitos Humanos e Justiça Internacional*, 6 ed., Saraiva, São Paulo, 2015.

³⁵⁸ Mac-Gregor, Eduardo F. Interpretación Conforme y Control Difuso de Convencionalidad: El nuevo paradigma para el juez mexicano, *Estudios Constitucionales*, Centro de Estudios Constitucionales de Chile, Universidad de Talca, year 9, n. 2, 2011, p. 570.

interpretation, in order to confer as much effectiveness as possible to the human rights provisions of the American Convention and its Protocols. According to Mazzuolli and Teixeira, “the dialogue of the sources is the search for a solution not only for the application of a single source of law but for the one most favorable to the protection of human rights.”³⁵⁹

The Inter-American System should be inspired by national systems that give environmental rights constitutional status, such as the Brazilian, and not be timid on accepting the justiciability of the environmental rights even in its economic and social nature, what is the trend after the Advisory Opinion OC-23/17. This is the first step for the Inter-American System to accept the discussion of those environmental rights in its individual petition system.

The Inter-American System, also, in the name of the principle of “*restitutio in integrum*” extracted from Article 63.1 of the American Convention, should be more assertive in the search for the appropriate remedy for environmental harms in the legal system of the States. It is required a remedy able to enforce specific performance measures by national courts to fully compensate for the environmental harm, the same way compensatory damages can be enforced according to Article 68.2 of the American Convention. The IACourtHR “has [already] affirmed that all of its ‘decisions’ – from judgments on the merits to orders on State compliance and provisional measures – are legally binding [which means that] State obligations may not be altered or mitigated ‘by invoking provisions of difficulties of domestic law.’”³⁶⁰ So, in order to treat environmental rights in the same footing as civil and political rights, the Inter-American System must offer the appropriate remedy for the harm, which must be affirmed and enforced by the judicial branch of each State, even if it entails a broad range of reparations such as “restitution, rehabilitation, satisfaction, and guarantees of non-repetition, in conjunction with pecuniary and non-pecuniary damages.”³⁶¹

The Inter-American System, in addition, must recognize that the principle of “progressive achievement” of economic and social rights has two prongs: (1) when stated

³⁵⁹ Mazuolli, Valério O. Teixeira, Gustavo. F. International Environmental Law, *supra* note 265, p. 183.

³⁶⁰ Antkowiak, Tomas M. et al. The American Convention on Human Rights, *supra* note 191, p. 12.

³⁶¹ *Id.*

in general by provisions of the American Convention, the principle commits executive and legislative branches to adjust public policies in the search for the best results limited to the resources available; and, (2) when specifically determined by the Courts, the principle commits national judicial branches to develop the jurisprudence in order to provide the highest efficacy possible to the human rights provisions of the American Convention by enforcing the IACourtHR's decision within each State. This understanding observes the principles of "*restitutio in integrum*" and "*pro persona*" interpretation, by providing the best answer possible to the violations of human rights identified by the IACourtHR.

The text of Article 68.2 provides the most straightforward way to enforce IACourtHR decisions, especially in individual cases dealing with civil and political rights. In Brazil, for instance, the statute that allows the execution against the State of the "part of a judgment that stipulates compensatory damages"³⁶² is the Federal Law 13.105/2015, as known as the Civil Procedure Code.³⁶³ However, Article 68.2, is not the only provision in the American Convention that grounds the enforceability of IACourtHR decisions. Article 63.1 provides that "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated." In the case of environmental harms, to guaranty the "enjoyment of the right," or the "*restitutio in integrum*," it will be necessary the issuing of specific performance or structural measures. So, what is necessary for the Brazilian courts to do to "dialogue" with the Inter-American System and warrant enforceability of the IACourtHR decisions?

Brazilian Courts already give a high degree of legal fidelity and sanctioning power to environmental rights and work towards end impunity for environmental harm³⁶⁴ through the massive use of class actions, public civil actions, popular actions, in which courts determine a broad range of measures to recover the environment. This movement contributed to a change in the sense of impunity that many Brazilians have about environmental harms.³⁶⁵ As examples of those measures, Barcellos mentions that

³⁶² American Convention on Human Rights, *supra* note 110, Article 68.2.

³⁶³ Brazil. Civil Procedure Code, *supra* note 264.

³⁶⁴ McAllister, L. K. Making Law Matter, *supra* note 335, p. 2.

³⁶⁵ *Id.*, p. 13.

courts may simply ask defendants to prepare and present a plan of action to provide sanitation services, or establish reasonable deadlines for the services to be delivered.... Courts may also employ a newer public law litigation model, sometimes called experimentalism, which asks defendants to propose how they will comply with a broad order. The court may then need to negotiate and monitor the defendant's subsequent performance.³⁶⁶

All of those measures can be enforced by the imposition of fines,³⁶⁷ seizure of money, and other coercive measures foreseen in the Civil Procedure Code.³⁶⁸

Consequently, Brazilian courts have all the tools required to enforce environmental rights, either if they are discovered in national courts or if they are found by the IACourtHR. Brazilian courts are allowed to enforce IACourtHR decisions in collective economic and social rights in general, and environmental rights in specific, the same way they enforce the rulings in class actions, public civil actions and popular actions, by enforcing the specific performance measures determined by the regional court, by the following reasons: (1) Brazil accepts the jurisdiction of the IACourtHR; (2) Article 68.2 of the American Convention opens the door when allows the execution of IACourtHR decisions within national courts; (3) Economic and social rights, as well as environmental rights, are in the same footing as civil and political rights, and they are considered justiciable in Inter-American System and in Brazil, reason why they must be equally enforceable within State judicial branch; (4) Article 63.1 of the American Convention establishes the principle of “*restitution in integrum*,” that requires specific performance or structural measures to redress for environmental harms, which are ordinarily adopted and enforced by Brazilian courts; (5) The principle of “progressive achievement” for economic and social rights is also directed to the judicial branches, which means that national courts need to improve the jurisprudence to afford remedies, accessible to the affected persons, and in reasonable time³⁶⁹ to make possible the execution of specific performance measures in national courts and achieve the highest effectiveness as possible to environmental rights; (6) The “*pro persona*” interpretation,

³⁶⁶ Barcellos, Ana Paula De. Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil, *Health and Human Rights Journal*, n. 2, v. 16, 2014, p. 41.

³⁶⁷ *Id.*

³⁶⁸ Brazil. Civil Procedure Code, *supra* note 264.

³⁶⁹ American Convention on Human Rights, *supra* note 110, Article 46.1 (a), (b), and (c).

requires national judges to provide as much effectiveness as possible to the provisions of the American Convention and its Protocols, which means that before a IACourtHR opinion that decides the merits of the case, it is against effectiveness if national courts have to discuss the merits of the case again; (7) Brazilian Constitution, environmental laws and procedural rules provide specific remedies and allow the use of a broad range of measures in order to courts determine the recuperation of the environment, in the name of the principle of “*restitutio in integrum*,” however in specific cases – such as prison conditions – “there has been unwarranted delay in rendering a final judgment under the [afforded] remedies.”³⁷⁰

Once established the justiciability and enforceability of environmental rights by the “*dialogue des sources*” between the Inter-American System and the Brazilian legal system, it will influence the methods of human rights litigation in the American Hemisphere. However, if environmental rights are justiciable and enforceable, why do prison conditions cases are not afforded effective remedies? And what would be the consequences of this new paradigm in cases of prison conditions, such as the *Central Prison*?

4.4. The advantages of using environmental strategies in prison conditions situations and for the case study

Prison conditions situations were traditionally thought of as criminal and criminal execution cases in national courts, as well as violations of individual civil and political human rights issues in Inter-American System. In Brazil, for example, the Criminal Execution Statute (“*Lei de Execução Penal*”)³⁷¹ establishes the standards related to the criminal execution, including prisoners’ rights and environmental standards related to prison conditions.³⁷² In the Inter-American System, prison conditions were thought to be

³⁷⁰ American Convention on Human Rights, *supra* note 110, Article 46.1, (c).

³⁷¹ Brazil. Federal Law 7210/1984, available at www.planalto.gov.br/ccivil_03/leis/l7210.htm, last accessed on 18 October 2019.

³⁷² *Id.*, Articles 82-103.

a violation of Article 5 of the American Convention,³⁷³ that mentions the right to humane treatment, besides the right to life in Article 4.

However, as affirmed in chapter 3.3, *prison conditions* are the collective, economic, and social nature of the issue *conditions of detention*. Although the issue *conditions of detention* (in general) have been indiscriminately raised in the Inter-American System, when those cases were related to *prison conditions* (in specific), they could not fit in the traditional methods of litigation for the protection of human rights, because they bring up environmental harms to the discussion. Therefore, IACourtHR and domestic courts must distinguish the cases that generally deal with *conditions of detention strictu sensu* from the ones that discuss *prison conditions*, according their real nature. It will allow both systems to deliver the most appropriate remedy for each kind of violation.

With this distinction – and having in mind the ongoing process of approximation of human rights and the environment, as well as the idea of an autonomous right to a healthy environment – the Inter-American System will not only be used by *prison conditions* defenders in the absence of an environmental protection system at the regional level,³⁷⁴ but the Inter-American System will start to be shaped by *prison conditions* cases to allow the system to develop effective remedies to redress for collective environmental harms. And this movement does not occur only in *prison conditions* cases, but with all environmental cases with collective, economic, and social nature.

The advantage of an environmental approach to prison conditions situations is that environmental rights have “the ability to bring together under one single umbrella the normative content of the variegated rights affected by environmental harm.”³⁷⁵ For that reason, an environmental approach can redress for the environmental harms collectively,

³⁷³ American Convention on Human Rights, *supra* note 110, Article 5. Right to Humane Treatment. 1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

³⁷⁴ Orellana, Marcos. Habitat for Human Rights *supra* note 267, p. 443.

³⁷⁵ *Id.*, p. 436.

restoring not only the economic and social rights violated but also all individual, civil, and political rights affected. By repairing the prison conditions, inmates' individual rights to life, health, and to a human and non-degrading treatment will be redressed, as well as staff of the prison that would work in a healthier place, at the same time as the collective right to a healthy environment. Besides, as Benjamin³⁷⁶ states, environmental law has “a clear preoccupation with implementation, aimed at preventing the... norm from taking on a rhetorical feature.... Environmental law has an aversion to empty discourse. [I]t is a legal discipline of result, which is only justified by what it achieves, concretely, in the social context of degrading interventions.”³⁷⁷ Environmental law can bring to the discussion different rights involved in the issue and work in a practical manner to redress issues collectively and effectively.

The case study, *Persons Deprived of Liberty at Porto Alegre Central Prison, Brazil*,³⁷⁸ can benefit from this environmental approach. Although in 2013, when the case was filed before the IACHR the legal reasoning did not mention environmental rights, a considerable part of the petition is grounded on environmental harms.³⁷⁹ At the time this thesis is being finished (December 2019), the IACHR has not decided case 13.353 on its merits, and MC 08-13 is currently effective, yet Brazil has not fully complied with the provisional measures.³⁸⁰ If the IACHR decides to bring the Central Prison case to the IACourtHR, the regional system will have the chance to rule on the merits of a case involving environmental harms in prisons or *prison conditions*. It would not be unlikely, considering the development of the concepts described in the last chapters, especially after the understanding shown in the Advisory Opinion OC-23/17.

The substantial innovation, however, will happen within national borders. After 2008, when the Brazilian Federal Supreme Court accepted the conventionality control,³⁸¹

³⁷⁶ Benjamin, Antonio H de V. E. O Meio Ambiente Na Constituição Federal de 1988, Informativo Jurídico da Biblioteca Ministro Oscar Saraiva, v. 19, n. 1, jan./jun. 2008, available at <https://ww2.stj.jus.br/publicacaoainstitucional/index.php/informativo/article/viewFile/449/407>, last accessed on 28 October 2019.

³⁷⁷ *Id.*

³⁷⁸ Case 13.353 (MC 08-13).

³⁷⁹ See Table 1, Environmental hazards at Porto Alegre Central Prison, chapter 1.4.

³⁸⁰ Forum of the Penitentiary Issue, Petitioner's Final Argument, *supra* note 218.

³⁸¹ Brazil. Federal Supreme Court. RE 466343, *supra* note 356.

every single judge in national courts became aware of its participation in the Inter-American Systems and are increasing the control of national statutes according to the American Convention.^{382 383} In the same tendency, Brazilian courts are giving appropriate answers to individual, civil, and political rights violations in prisons and started to afford monetary damages to inmates that file cases against the state of Rio Grande do Sul for the only reason they have been to Central Prison. On October 08, 2019, for example, Zero Hora Newspaper published an article with the following headline: “State condemned to pay compensation to Central prisoners for poor conditions and overcrowding.”³⁸⁴ The article refers that “Central Prison problems such as overcrowding, lack of cells, open sewage and the rule of criminal factions are causing the state to be condemned by the court to compensate prisoners who passed through the place.”³⁸⁵ The Rio Grande do Sul Appellate Court established the amount of damages in R\$ 500,00 (around US\$ 125,00) for each year that the inmate has been in Central Prison.³⁸⁶

Although it is not a great amount, that is the answer that Brazilian courts have to individual, civil, and political rights violations in Presidio Central. However, this is the aspect of *conditions of detention*, which refers to the *conditions of detention stricto sensu*. There is an appropriate remedy in the domestic legal system to redress for individual harms, which can lead to the Inter-American System to deny admission to the petition according to Article 46 of the American Convention.³⁸⁷

The problem is the aspect of *prison conditions*, where the issues are the right to a healthy environment for detainees, prison workers, family members, in a particular prison, region, or the whole country. In these cases, Brazil is not providing an adequate remedy in a reasonable time, which justifies the petition in the Inter-American System to seek redress for the environmental harms. About this topic, in 2015, the Brazilian Federal

³⁸² Piovesan, Flávia. *Direitos Humanos e Justiça Internacional*, 6 ed., *supra* note 357.

³⁸³ Mac-Gregor, Eduardo F. *Interpretación Conforme y Control Difuso*, *supra* note 358, p. 570.

³⁸⁴ Zero Hora, available at <https://gauchazh.clicrbs.com.br/seguranca/noticia/2019/10/estado-e-condenado-a-pagar-indenizacao-a-presos-do-central-por-mas-condicoes-e-superlotacao-ck1i61dnz043y01n3wpme860w.html>, last accessed on 23 October 2019.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ American Convention on Human Rights, *supra* note 110, Article 46.

Supreme Court declared an “unconstitutional state of affairs” (“estado de coisas inconstitucional”) regarding the prison system in the entire country.³⁸⁸ The concept was borrowed from the Colombian Constitutional Court and implies the possibility of courts to apply flexible measures to be coordinated in conjunction with the other branches of government and stakeholders.³⁸⁹

This thesis brings up one of the possible “flexible measures” grounded on the application of the principles of the American Convention. After an eventual decision of the IACourtHR in favor of the plaintiffs, Brazilian courts will have the opportunity to develop their jurisprudence in the name of a “progressive achievement” of economic and social rights, towards the principles of “*restitutio in integrum*” and “*pro persona*” interpretation, to enforce specific performance measures in the name of the full restoration of environmental harms in Central Prison. The courts will have the chance to apply the same methods of enforcement they use in environmental class actions, civil public actions, popular actions, without the need to rediscuss the merits of the case, going straight to the execution of the IACourtHR decisions, resembling similar provision foreseen to the execution of compensatory damages of individual, civil and political rights.

³⁸⁸ Brazil. Federal Supreme Court. ADPF 347, available at <http://portal.stf.jus.br/processos/downloadPeca.asp?id=308712125&ext=.pdf>, last accessed on 17 October 2019.

³⁸⁹ *Id.*, p. 7-8.

CONCLUSION

Although human rights and environmental rights regimes have different natures and goals – the first traditionally focuses on the individual while the latter emphasizes the collective and even intergenerational rights – they are in the process of an ongoing approximation that started in the 1972 Stockholm Declaration. The United Nations Special Rapporteur Fatma Ksentini deepened the studies in the 1990s, identifying that “[e]nvironmental damage has direct effects on the enjoyment of a series of human rights,”³⁹⁰ and also that “human rights violations in their turn damage the environment,”³⁹¹ which prompted the “greening” of other human rights such as the right to life and health in the following years.³⁹² Finally, this process of approximation had its heyday in 2018 with the IACourtHR’s recognition of an “autonomous right to a healthy environment under the American Convention” in the Advisory Opinion OC-23/17,³⁹³ observing Article 11 of the Protocol of San Salvador,³⁹⁴ which starts a new era in the interdependence of both regimes, opening additional doors for further advancements in this topic.

One of the topics to be developed is the relation between human rights and the environment in prisons. As seen in chapter 1.2, prison facilities fit in the concept of the man-made environment because they are a product of a human activity that modifies the natural environment to provide a place to keep the inmates separate from the rest of the community. At the same time, as discussed in chapter 2.2, prisoners are considered particularly vulnerable to environmental hazards because they are an involuntarily displaced population, since they are taken into custody against their will, staying in prisons with minimal possibility to interfere in the environment to avoid harm to their life, health, or dignity the same way that a free person can. Therefore, as a vulnerable group, prisoners are entitled to receive the special consideration foreseen in international environmental rights documents, such as the UN Agenda 21.³⁹⁵ Nonetheless, the reality

³⁹⁰ Ksentini Report, *supra* note 8, p. 60.

³⁹¹ *Id.* p. 61.

³⁹² Knox, John H *et al.* The Human Right to a Healthy Environment, *supra* note 10, p. 2.

³⁹³ Inter-American Court of Human Rights. Advisory Opinion OC-23/17, *supra* note 12.

³⁹⁴ Additional Protocol to the American Convention on Human Rights, *supra* note 13.

³⁹⁵ United Nations. Agenda 21, *supra* note 150.

is the opposite. The conditions of detention in many prisons in Latin American and particularly in the case study, shown in chapter 1.4, are formed by water infiltration, leaking, humidity stains, fungi, mold, apparent electrical networks, inexistence of sewerage system, overcrowding, feces, urine, remains of food, dirt, rats, cockroaches, exposure to extreme temperatures, contamination, chemical exposure, spread of communicable diseases, and many other examples of environmental hazards that affect life, health, and dignity of the inmates.

As presented in chapter 3, the Inter-American System of protection of human rights has been called upon to solve human rights violations in the American Hemisphere related to the conditions of detention through the individual petition system. The adoption of the Inter-American System must be celebrated because it provides remedies to discuss environmental issues at the regional level and even to prompt States to resolve some of these issues. However, the human rights theory is traditionally focused on the individual – even as part of a group – while environmental theory is focused on collective rights, not necessarily related to specific individuals. This fundamental difference makes the machinery of protection of human rights not fully appropriate to provide the best tools to restore environmental hazards.³⁹⁶ The redress for the affected environment frequently requires that the IACHR or the IACourtHR deal with collective, economic, and social rights, as well as with the issuing of specific performance and structural measures for the benefit of the collectivity, instead of mere monetary compensation or other measures in favor of individuals.

However, new perspectives to solve the issue of *conditions of detention* arise if the discussion migrates from a human-rights-only approach to an environmental-human-rights approach. National legal frameworks with strong enforcement measures in environmental matters – like the Brazilian – could interact (in a “*dialogue des sources*”) with the Inter-American System providing – and receiving – theoretical grounds and concrete remedies to bring solutions for these issues.

As expressed in chapter 3.2, the Inter-American System has several cases regarding violations of human rights arising from the conditions of detention. However, neither the IACHR nor the IACourtHR distinguishes the conditions of detention

³⁹⁶ Atapattu, Sumudu. *The Right to a Healthy Life* *supra* note 6, p. 71.

according to the nature of the rights affected. As affirmed in chapter 4.1, environmental rights can reveal elements of civil or political rights in one situation, as well as economic and social aspects in others. Also, environmental rights can be considered individually or collectively, depending on the range of people affected. The issue *conditions of detention*, then, can be divided in two categories: (1) *conditions of detention stricto sensu*, that refers to the conditions of detention inflicted to a specific individual in violation of its civil and political rights; and (2) *prison environment*, which are the conditions of detention in a specific country, prison, detention center, police station, in violation of non-individual economic and social rights.

The distinction is important for the Inter-American System to identify the differences and provide an adequate remedy for each situation. In cases of *prison environment*, the IACourtHR's binding decisions would order specific performance or structural measures forcing the State to expend resources to redress for the environmental harm. Although the traditional doctrine defends that economic and social rights are "nonjusticiable" to preserve the sovereignty of the States parties, the current status of the economic and social rights in the Inter-American System is different. After the 1993 Vienna Declaration, the United Nations affirmed the idea that all human rights are interdependent, must be treated equally, on the same footing, and with the same emphasis.³⁹⁷ With that in mind, the IACHR and the IACourtHR started paving the way to economic and social rights to be justiciable in the Inter-American system and even went beyond with the recognition of a right to a healthy environment under the American Convention. The current understanding affirming the justiciability of economic and social rights in the system also relies on national legal frameworks that accept the justiciability of those rights in their national constitutions, legislation, and courts.

Therefore, as mentioned in chapter 4.2., the Inter-American system and the Brazilian legal system engage in a "*dialogue des sources*" in order to reinforce principles of the American Convention such as the "*restitutio in integrum*," particularly when environmental rights are at stake; the "progressive achievement" for economic and social rights, directed to executive, legislative, and judicial branches; and the "*pro persona*"

³⁹⁷ Vienna Declaration and Programme of Action, *supra* note 289.

interpretation, in order to confer as much effectiveness as possible to the human rights provisions of the American Convention and its Protocols.

In summary, cases of *conditions of detention* went before the Inter-American system looking for remedies to redress for the environmental hazards in prisons that the national legal system was not able to provide in reasonable time. It has occurred with Brazil in several cases in which the Porto Alegre Central Prison is one example. The strong enforceability of environmental provisions in the Brazilian legal system provides arguments to the Inter-American System to affirm the justiciability of economic and social rights in general and environmental rights in particular. The Brazilian legal system, then, end up shaping the remedies of the Inter-American System based on the national environmental framework, where courts consider economic and social rights justiciable and commonly order specific performances in collective actions to redress for environmental hazards.

On the other hand, the Inter-American System empowers economic, social, and environmental provisions at the national level, serving as landmark for the Brazilian Constitution, legislation, executive acts, and for the development of the jurisprudence of the courts. The Inter-American System provides alternatives and legal arguments for the courts to enhance the enforcement of the environmental rights in prisons, as an answer to the “unconstitutional state of affairs” declared by the Brazilian Supreme Court.³⁹⁸ The Inter-American system affirms the possibility of the execution in national courts of the IACourtHR decisions grounded on Article 68.2 and the principles of the American Convention.

To conclude, the environmental approach proposed in this study intends to bring new elements to the ongoing process of approximation of human rights and the environment. For the particular cases of *conditions of detention*, and for the case study in particular, (1) the environmental approach will bring together under one single umbrella several different rights violated by environmental hazards,³⁹⁹ unifying the solutions for the collective economic and social rights violated and for all individual, civil, and political rights affected; (2) the Inter-American system will not only be used by the defenders of

³⁹⁸ Brazil. Federal Supreme Court. ADPF 347, *supra* note 388.

³⁹⁹ Orellana, Marcos. Habitat for Human Rights *supra* note 267, p. 436.

the *conditions of detention* in the absence of an environmental protection system at the regional level, but the Inter-American system will start to be shaped by those cases prompting the system to develop effective remedies to redress for collective environmental harms; (3) the Inter-American System will search for answers to its limitations regarding justiciability and enforceability in countries with strong environmental framework, which is the case of Brazil; (4) on the other hand, national legal systems, like the Brazilian, will end up being shaped by the Inter-American system, with the development of the constitutional provisions, legislation, executive acts, and finally, of the jurisprudence of the courts.

REFERENCES

- Acebes, Cezar M., Brazil's correctional houses of horror, Foreign Affairs, 2017, available at <https://www.foreignaffairs.com/articles/brazil/2017-01-18/brazil-s-correctional-houses-horror>, last accessed 14 April 2019.
- Acevedo, Marina. The intersection of Human Rights and Environmental Protection in the European Court of Human Rights, New York University Environmental Law Journal, v. 8, p. 438.
- Additional Protocol to the American Convention on Human Rights, available at <http://www.oas.org/juridico/english/treaties/a-52.html>, last accessed on 14 April 2019.
- Aguilar, Digna. Head of Interinstitutional Communications of the National Penitentiary Institute, Interview on 12 August 2019.
- AJURIS website, Petition in case #13.353 in the IACHR, available at <http://www.ajuris.org.br/sitenovo/wp-content/uploads/2016/06/representacao-pcpa-oea-2013.pdf>, last accessed on 14 April 2019.
- Alston, P. & Goodman, R., International Human Rights: The Successor to International Human Rights in Context, Oxford University Press 2013, p. 142.
- American Bill of Rights, available at <https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf>, last accessed on 14 April 2019.
- American Convention on Human Rights, available at <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>, last accessed on 17 August 2019.
- American Declaration of the Rights and Duties of Man, available at https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf, last accessed on 09 October 2019.
- Antkowiak, Tomas M. et al. The American Convention on Human Rights: essential rights, Oxford University Press, New York, 1 ed., 2017, p. 5.
- Armstrong, Andrea C. Death Row Conditions Through an Environmental Justice Lens, Arkansas Law Review, v. 70, pp. 217-219, quoting Donna Heron, Federal Prisons to Get Environmental Checks, EPA, July 24, 2007, available at <https://scholarworks.uark.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1011&context=alr>, last accessed 14 April 2019.
- Atapattu, Sumudu. The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law, Tulane Environmental Law Journal, v. 16, p. 70.

- Banco Nacional do Desenvolvimento website, available at <https://www.bndes.gov.br/wps/portal/site/home/conhecimento/noticias/noticia/casas-mortes-brasil>, last accessed on 14 April 2019.
- Banda, Maria L. Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights, ASIL insights home, v. 22, issue 6, available at <https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human>, last accessed on 14 April 2019.
- Barberena, Yesenia Judith. Prisoners in Latin America: What the Inter-American Human Rights system can do to protect prisoners' human rights, *George Washington International Law Review*, v. 47, p. 703.
- Barcellos, Ana Paula De. Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil, *Health and Human Rights Journal*, n. 2, v. 16, 2014, p. 41.
- Bawole, Paulus, Harmony with Nature for Sustainable Built Environment, Man Made and Natural Environment, available at https://www.irbnet.de/daten/iconda/CIB_DC22849.pdf, last accessed on 14 April 2019.
- Beck, Ulrich. *Risk Society: Towards a New Modernity*, Sage Publication, 1992, 260 pages.
- Behnke, Nikki *et al.* Improving environmental conditions for involuntarily displaced populations: water, sanitation, and hygiene in orphanages, prisons, and refugee and IDP settlements. *Journal of Water Sanitation and Hygiene for Development*, 2018, 10.2166/washdev.2018.019, available at https://www.researchgate.net/publication/326163553_Improving_environmental_conditions_for_involuntarily_displaced_populations_water_sanitation_and_hygiene_in_orphanages_prisons_and_refugee_and_IDP_settlements, last accessed on 14 Apr 2019.
- Benjamin, Antonio H de V. E. O Meio Ambiente Na Constituição Federal de 1988, *Informativo Jurídico da Biblioteca Ministro Oscar Saraiva*, v. 19, n. 1, jan./jun. 2008, available at <https://ww2.stj.jus.br/publicacaoainstitucional/index.php/informativo/article/view/File/449/407>, last accessed on 28 October 2019.
- Bessler, John D. The Concept of “Unusual Punishments” in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual, *Northwestern Journal of Law and Social Policy*, v. 13, p. 308.
- Bol, Jennifer. Using International Law to Fight Child Labor: A case Study of Guatemala and the Inter-American System, *American University International Law Review*, v. 13, issue 5, p. 1135.
- Boyce et al. v. Barbados, *Loyola of Los Angeles International and Comparative Law Review*, v. 36, 2014.

Boyce et al. v. Barbados, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, paragraph 127 (Nov. 20, 2007).

Boyd, David R. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*. UBC Press, 2012, p. 23.

Bradford, Andrew R. *An Examination of the Prison Environment: An Analysis of Inmate Concerns across Eight Environmental Dimensions*, Electronic Theses and Dissertations. Paper 2216, 2006, p. 2, available at <http://dc.etsu.edu/etd/2216>, last accessed on 14 April 2019.

Brazil. Câmara dos Deputados, CPI do sistema carcerário, 2008, p. 488, available at <https://www.conjur.com.br/dl/relatorio-cpi-sistema-carcerario.pdf>, Last accessed 14 April 2019.

____ Civil Procedure Code, available at http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm, last accessed on 09 September 2019.

____ Constitution of the Federative Republic of Brazil, available at <http://english.tse.jus.br/arquivos/federal-constitution>, last accessed on 14 April 2019.

____ Federal Law 10.257/2001, available at www.planalto.gov.br/ccivil_03/leis/LEIS_2001/L10257.htm, last accessed on 18 October 2019.

____ Federal Law 12.651/2012, available at www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12651.htm, last accessed on 18 October 2019.

____ Federal Law 4717/1965, available at www.planalto.gov.br/ccivil_03/LEIS/L4717.htm, last accessed on 18 October 2019.

____ Federal Law 5197/1967, available at www.planalto.gov.br/ccivil_03/leis/L5197compilado.htm, last accessed on 18 October 2019.

____ Federal Law 6938/1981, Article 3, available at www.planalto.gov.br/ccivil_03/LEIS/L6938.htm, last accessed on 18 October 2019.

____ Federal Law 7210/1984, available at www.planalto.gov.br/ccivil_03/leis/17210.htm, last accessed on 18 October 2019.

____ Federal Law 7347/1985, available at www.planalto.gov.br/ccivil_03/leis/L7347orig.htm, last accessed on 18 October 2019.

- ____ Federal Law 8078/1990, Article 6, VIII, available at www.planalto.gov.br/ccivil_03/leis/18078.htm, last accessed on 18 October 2019.
- ____ Federal Law 8171/1991, available at www.planalto.gov.br/ccivil_03/LEIS/L8171.htm, last accessed on 18 October 2019.
- ____ Federal Law 9433/1997, available at www.planalto.gov.br/ccivil_03/LEIS/L9433.htm, last accessed on 18 October 2019.
- ____ Federal Law 9605/1998, available at www.planalto.gov.br/ccivil_03/leis/19605.htm, last accessed on 18 October 2019.
- ____ Federal Law 9985/2000, available at www.planalto.gov.br/ccivil_03/LEIS/L9985.htm, last accessed on 18 October 2019.
- ____ Federal Supreme Court. ADI 3540-MS/DF, 2005, at. 37, available at <http://www.stf.jus.br/imprensa/pdf/adi3540-MC.pdf>, last accessed on 17 October 2019.
- ____ Federal Supreme Court. ADPF 347, available at <http://portal.stf.jus.br/processos/downloadPeca.asp?id=308712125&ext=.pdf>, last accessed on 17 October 2019.
- ____ Federal Supreme Court. RE 466343, available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=2343529>, last accessed on 21 October 2019.
- ____ Ministry of Justice, DEPEN, Departamento Penitenciário Nacional, Levantamento Nacional de Informações Penitenciária, 2016, available at http://depen.gov.br/DEPEN/noticias-1/noticias/infopen-levantamento-nacional-de-informacoes-penitenciarias-2016/relatorio_2016_22111.pdf, last accessed on 28 October 2019.
- Caesar v. Trinidad and Tobago, *Loyola of Los Angeles International and Comparative Law Review*, v. 36, 2014, p. 1077.
- Calabresi, S. & Silverman, B. Hayek and the citation of foreign law: a response to Professor Jeremy Waldron, *Michigan State Law Review*, v. 1, pp. 123-124, 2015.
- Cavallaro, J.L. and Shaffer, E. J. Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas, *Hastings Law Journal*, 2004, p. 267.
- CNN, <https://www.cnn.com/2019/05/27/americas/brazil-prison-deaths-intl/index.html>, last accessed on 31 May 2019.
- Cornescu, Adrian V. The Generations of Human's rights. *Days of Law: the Conference Proceedings*, Masaryk University, 1 ed., 2009.

- Díaz Peña v. Venezuela, *Loyola of Los Angeles International and Comparative Law Review*, v. 37, 2015, p. 1927.
- Donoso, Gina. Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach, *Revista do Instituto Interamericano de Derechos Humanos*, v. 49, p. 61.
- EarthWatch website, available at <https://earthwatch.org>, last accessed on 14 April 2019.
- El Heraldo, Centro Penal de San Pedro Sula pasa a la historia, available at <https://www.elheraldo.hn/pais/1116790-466/centro-penal-de-san-pedro-sula-pasa-a-la-historia>, last accessed on 12 August 2019.
- Engle, Eric. Universal Human Rights: A generational story, *Annual Survey of International & Comparative Law*, v. 12, p. 233.
- English Bill of Rights, available at <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/data.pdf>, last accessed on 14 April 2019.
- Factory at Chorzow (Ger. v. Pol.), 1927 P.C.I.J. (Ser. A), p. 47.
- Fermín Ramírez v. Guatemala, *Loyola of Los Angeles International and Comparative Law Review*, v. 36, 2014, p. 2143.
- Fermín Ramírez v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 126, paragraph 130(f) (Jun 20, 2005).
- Fiorillo, Celso Antonio Pacheco. *Curso de direito ambiental brasileiro*, 14 ed., São Paulo, Saraiva, 2013.
- Flynn, N. and Baker, N. Introduction to prisons and imprisonment, 1998, pp. 84-87, available at <http://ebookcentral.proquest.com>, created from iupui-ebooks on 2019-02-09 10:50:09.
- Folha de São Paulo. Serra conclui desativação da Febem do Tatuapé, 16 October 2007, available at <https://www1.folha.uol.com.br/fsp/cotidian/ff1610200726.htm>, last accessed on 15 August 2018.
- Forum of the Penitentiary Issue. Petitioner's Final Argument in case #13.353 before the IACHR.
- Galizzi, Paolo. From Stockholm to New York, via Rio and Johannesburg: has the environment lost its way on the global agenda?, *Fordham International Law Journal*, v. 29, p. 1002.
- Greenpeace website, available at <https://www.greenpeace.org/international/>, last accessed on 14 April 2019

- Handl, Guinter. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992, United Nations Audiovisual Library of International Law, available at <http://legal.un.org/avl/ha/dunche/dunche.html>, last accessed on 14 April 2019.
- Hathazy, Paul. The crisis of detention and the politics of denial in Latin America, *International Review of the Red Cross*, v. 98, n. 903 December 2016, pp. 889-916.
- Helpie-Schmieder, Brenna. Toxic confinement: can the eighth amendment protect prisoners from human-made environmental health hazards?, *Northwestern University Law Review*, v. 110, p. 648.
- Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, *Loyola of Los Angeles International and Comparative Law Review*, v. 37, 2014, p. 1091.
- Holt, Daniel W. E. Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change, Sabin Center for Climate Change Law, Columbia Law School, 2015, available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf, last accessed on 14 April 2019.
- Howard, John. *The State of the Prisons in England and Wales*, W. Eyres, 1780.
- Hudson, Manley O. Charter of the Organization of American States, Bogota, 30 April 1948, *Naval War College International Law Studies*, v. 46-1, 2014.
- Human Rights Defense Center website, available at <https://www.humanrightsdefensecenter.org/about/>, last accessed on 14 April 2019.
- Inter-American Commission on Human Rights website. Precautionary Measures, available at <http://www.cidh.org/medidas/2004.eng.htm>, last accessed on 15 August 2019.
- Inter-American Commission on Human Rights. November 28, 2018 Resolution regarding the Provisional Measures of the Curado Prison Complex, available at http://www.corteidh.or.cr/docs/medidas/curado_se_06_por.pdf, last accessed on 15 August 2019 (in Portuguese).
- Inter-American Commission on Human Rights. Resolution 14/2013, Precautionary Measure no. 8-13, available at [http://www.oas.org/en/iachr/decisions/pdf/Resolution14-13\(MC-8-13\).pdf](http://www.oas.org/en/iachr/decisions/pdf/Resolution14-13(MC-8-13).pdf), last accessed on 14 April 2019.
- Inter-American Court of Human Rights. Advisory Opinion OC-23/17, November 15, 2017, Requested by the Republic of Colombia, available at http://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf, last accessed on 20 October 2019.

- International Committee of the Red Cross. Annual Conference of the International Corrections and Prisons Association (ICPA), statement by Peter Maurer, ICRC president, Windhoek, Namibia, 2014, available at <https://www.icrc.org/en/document/annual-conference-international-corrections-and-prisons-association-icpa>, last accessed on 14 April 2019.
- International Covenant on Civil and Political Rights, available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last accessed on 07 October 2019.
- International Covenant on Economic, Social and Cultural Rights, available at <https://www.ohchr.org/EN/professionalinterest/pages/cescr.aspx>, last accessed on 07 October 2019.
- Jacobi, John V., Prison Health Public Health: Obligations and Opportunities, *American Journal of Law & Medicine*, v. 31, p. 466.
- Jaskowiak, C. R. and Fontana, R.T. The work in prison: reflections on the health of prison officers, *Revista Brasileira de Enfermagem*, 2015, 68(2), p. 216, available at <http://dx.doi.org/10.1590/0034-7167.2015680208i>.
- Jornal do Comércio, Ronda JC, available at <https://jc.ne10.uol.com.br/blogs/rondajc/2019/05/14/estrutura-do-complexo-do-curado-ainda-e-muito-ruim-diz-promotor/>, last accessed on 16 August 2019.
- Juvenile Reeducation Institute v. Paraguay, Preliminary Objections. Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 112, (Sept. 2, 2004), available at https://iachr.ils.edu/sites/default/files/001_juvenile_reeducation_institute_merits_2004.pdf, last accessed on 07 August 2019.
- Juvenile Reeducation Institute v. Paraguay. *Loyola of Los Angeles International and Comparative Law Review*, v. 38, 2016, 1446, p. 1471.
- Juvenile Reeducation Institute v. Paraguay. Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of November 19, 2009, available at <http://www.corteidh.or.cr/tablas/fichas/institutodereeducaci%C3%B3n.pdf>, Last accessed on 10 August 2019.
- Knox, John H et al. *The Human Right to a Healthy Environment*, Cambridge University Press, 2018, 290 pages.
- Lewis, Bridget, Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection, *Macquarie Journal of International and Comparative Environmental Law*, 2012, v. 8, p. 42.
- López Álvarez v. Honduras, *Loyola of Los Angeles International and Comparative Law Review*, v. 36, 2014, p. 2053.

- López Álvarez v. Honduras. Merits, reparations and costs. Judgment of February 1, 2006. Series C No. 141
- Lori Berenson Mejía v. Peru, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2015, p. 2609.
- Lori Berenson Mejía v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004), paragraph 241.
- Mac-Gregor, Eduardo F. Interpretación Conforme y Control Difuso de Convencionalidad: El nuevo paradigma para el juez mexicano, Estudios Constitucionales, Centro de Estudios Constitucionales de Chile, Universidad de Talca, año 9, N° 2, 2011, p. 570.
- Maranhão, Ney, Meio Ambiente: Descrição Jurídico-Conceitual, Lex Doutrina, available at http://www.lex.com.br/doutrina_27301129_MEIO_AMBIENTE_DESCRICAO_JURIDICO_CONCEITUAL.aspx, last accessed on 14 April 2019.
- Marques, Claudia Lima. Superação das Antinomias pelo Diálogo das Fontes: O Modelo Brasileiro de Coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002, Revista da ESMESE, n. 7, 2004, p. 43.
- Mazuolli, Valério O. and Teixeira, Gustavo F. International Environmental Law and the Greening of the American Convention on Human Rights, Anuario Mexicano de Derecho Internacional, v. 13, 2013, p. 145-203.
- McAllister, L. K. Making Law Matter: Environmental Protection and Legal Institutions in Brazil, Stanford University Press, 2008, p. 2.
- McGoldrick, Dominic. Sustainable Development and Human Rights: an integrated conception, The International and Comparative Law Quarterly, v. 45, n. 4, Oct. 1996, p. 811-812.
- Melish, Tara J. Rethinking the “Less as more” thesis: Supranational litigation of economic, social, and cultural rights in the Americas. New York University Journal of International Law and Politics, v. 39, p. 275.
- Merriam-Webster Dictionary, Definition of the environment, available at <https://www.merriam-webster.com/dictionary/environment>, last accessed on 14 April 2019.
- Montero Aranguren et al. v. Venezuela, Loyola of Los Angeles International and Comparative Law Review, v. 38, 2016, p. 1713.
- Nelson Mandela Rules, United Nations General Assembly Resolution 70/175, available at <https://undocs.org/A/RES/70/175>, last accessed on 14 April 2019.
- Ocean Conservancy website, available at <https://oceanconservancy.org/>, last accessed on 14 April 2019.

Orellana, Marcos. Habitat for Human Rights: environmental degradation and human rights: keynote address: 15th Annual Vermont Law Review Symposium: Habitat for Human Rights, Vermont Law Review, v. 40, p. 436.

Organization of the American States Charter, available at http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp#Chapter_VIII, last accessed on 16 August 2019.

Organization of the American States website, available at https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm, last accessed on 21 October 2019.

____ IACHR, available at <https://www.oas.org/en/iachr/>, last accessed on 14 October 2019.

____ IACHR, Multimedia, Statistics, available at <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html>, last accessed on 31 October 2019.

____ IACHR, Resolution N° 12/85, Case N° 7615, Brazil, March 5, 1985, available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>, last accessed on 14 October 2019.

____ Inter-American Commission on Human Rights Petition and Case System, Informational Brochure, 2010, available at https://www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf, last accessed on 30 October 2019.

____ Multilateral Treaties, American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32), available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm, last accessed on 17 August 2019.

Oxford Dictionary. Definition of the environment, available at <https://en.oxforddictionaries.com/definition/environment>, last accessed on 14 April 2019.

Pacheco Teruel et al. v. Honduras, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, 1771, p. 1785.

Pacheco Teruel et al. v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 241 (Apr. 27, 2012), available at https://iachr.ils.edu/sites/default/files/iachr/Court_and_Commission_Documents/Pacheco%20Teruel%20et%20al.%20v.%20Honduras.Merits.04.27.12.pdf, last accessed on 12 August 2019.

Pacheco Teruel et al. v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 241 (Apr. 27, 2012).

- Piovesan, Flávia. *Direitos Humanos e Justiça Internacional*, 6 ed., Saraiva, São Paulo, 2015.
- Popovic, Neil A.F., *In pursuit of environmental human rights: commentary on the draft declaration of principles on human rights and the environment*, *Columbia Human Rights Law Review*, v. 27, p. 490.
- Prison Legal News website. Human Rights Defense Center letter to the Deputy Associate Assistant Administrator for Environmental Justice, available at <https://www.prisonlegalnews.org/media/publications/EJ%202020%20letter%20to%20EPA%20HRDC%20updated%20comment%207-28-16%20with%20Cover%20Letter%202.pdf>, last accessed on 04 November 2019.
- Prison Policy Initiative, Reports, available at <https://www.prisonpolicy.org/reports/income.html>, last accessed on 14 April 2019.
- _____. U.S. incarceration by race, available at <https://www.prisonpolicy.org/graphs/raceinc.html>, last accessed on 14 April 2019.
- Rakia, Raven. *A sinking jail: The environmental disaster that is Rikers Island*, 2016, available at <https://grist.org/justice/a-sinking-jail-the-environmental-disaster-that-is-rikers-island/>, last accessed on 14 April 2019.
- Raxcacó Reyes v. Guatemala. *Loyola of Los Angeles International and Comparative Law Review*, v. 36, 2014, p. 1535.
- Reuters, <https://af.reuters.com/article/worldNews/idAFKCN1RM1B0>, last accessed on 31 May 2019.
- Rio Declaration on Environment and Development, Principle 10, available at <http://www.un-documents.net/rio-dec.htm>, last accessed on 14 April 2019.
- Sacha Darke, *Conviviality and Survival*, *Palgrave Studies in Prisons and Penology*, 2018, p. 45, available at https://doi.org/10.1007/978-3-319-92210-2_2, last accessed on 14 April 2019.
- Sawhoyamaxa Indigenous Community v. Paraguay, Judgment of March 29, 2006, (Merits, Reparations and Costs), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf, last accessed on 14 October 2019.
- Sayto, Natso T. *Colloquium Proceedings: Panel Three: Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in The United States*, *University of Miami Inter-American Law Review*, v. 28, p. 389.
- Sharp, Walter G. *The effective deterrence of environmental damage during armed conflict: a case analysis of the Persian Gulf War*, *Military Law Review*, v. 137, p. 1.

- Shaver, Lea. The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?, *Washington University Global Studies Law Review*, v. 9, p. 650, 2010.
- Shelton, Dinah. Human Rights, Environmental Rights, and the Right to Environment. *Stanford Journal of International Law*, v. 28, n. 1, Fall 1991, p. 105.
- Silva, José Afonso da. *Direito Constitucional Ambiental*, São Paulo, Malheiros Ed., 1994, p. 54.
- Skarbek, David. Covenants without the Sword? Comparing Prison Self-Governance Globally, *American Political Science Review*, v. 110, n. 4, November 2016.
- Standard Minimum Rules for the Treatment of Prisoners, available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf, last accessed on 14 April 2019.
- Sunstein, Cass R. Against Positive Rights. *University of Chicago Law School Chicago Unbound*, 1993, p. 38.
- Trindade, A. A. Cançado. *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Ambiental*, Sérgio Antônio Frabris Editor, Brazil, 1993.
- United Nations Environment Program website. UNEP Training Manual on International Environmental Law, available at <https://www.unenvironment.org/resources/report/unep-training-manual-international-environmental-law>, last accessed on 31 October 2019.
- United Nations. Agenda 21, United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 to 14 June 1992, available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, last accessed on 31 October 2019.
- _____. Annotations on the Draft International Covenants on Human Rights, available at documents-dds-ny.un.org/doc/UNDOC/GEN/N55/173/02/PDF/N5517302.pdf?OpenElement, last accessed on 09 October 2019.
- _____. Economic and Social Council, Review of further developments in fields with which the sub-commission has been concerned, Human rights and the environment, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9, available at <https://undocs.org/ru/E/CN.4/Sub.2/1994/9>, last accessed on 14 April 2019.
- _____. Report of the United Nations Conference on the Human Environment, in Stockholm, 1972, available at <http://www.un-documents.net/aconf48-14r1.pdf>, last accessed on 14 April 2019.

United States. Department of State, Report on International Prison Conditions, available at <https://www.state.gov/documents/organization/210160.pdf>, last accessed on 14 April 2019.

____ Environmental Protection Agency of the United States, Environmental Justice, available at <https://www.epa.gov/environmentaljustice>, last accessed on 14 April 2019.

____ Environmental Protection Agency of the United States, Federal Prisons to Get Environmental Checks, available at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/ac0e8764a666f41685257323006756ab.html, last accessed on 14 April 2019.

____ Environmental Protection Agency of the United States, EJ 2020 Action Agenda, available at https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf, last accessed on 14 April 2019.

Universal Declaration of Human Rights, available at <http://www.un.org/en/universal-declaration-human-rights/>, last accessed on 14 April 2019.

Vasak, Karel. A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights, *The UNESCO Courier*, November 1977, p. 29.

Vélez Lóor v. Panama, *Loyola of Los Angeles International and Comparative Law Review*, v. 36, 2014, p. 1143.

Vienna Declaration and Programme of Action, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, last accessed on 07 October 2019.

World Bank website, available at <https://databank.worldbank.org/data/download/GDP.pdf>, last accessed on 28 October 2019

World Health Organization website. Tuberculosis in prisons, available at <https://www.who.int/tb/areas-of-work/population-groups/prisons-facts/en/>, last accessed on 14 April 2019.

____ Environmental factors influencing the spread of communicable diseases, available at https://www.who.int/environmental_health_emergencies/disease_outbreaks/communicable_diseases/en/, last accessed on 14 April 2019.

World Prison Brief website, available at <http://www.prisonstudies.org/country/brazil>, last accessed on 14 April 2019.

Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005, (Merits, Reparations and Costs), available at

http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf, last accessed on 14 October 2019.

Yvon Neptune v. Haiti, Loyola of Los Angeles International and Comparative Law Review, v. 36, 2014, p. 1167.

Zero Hora, available at <https://gauchazh.clicrbs.com.br/seguranca/noticia/2019/04/presos-a-ceu-aberto-na-capital-quatro-dias-algemados-em-viaturas-dormindo-sentados-e-comendo-com-as-maos-cjupuuymfh01zp01p54cqam5q3.html>, last accessed on 31 May 2019.

_____ available at <https://gauchazh.clicrbs.com.br/seguranca/noticia/2019/10/estado-e-condenado-a-pagar-indenizacao-a-presos-do-central-por-mas-condicoes-e-superlotacao-ck1i61dnz043y01n3wpme860w.html>, last accessed on 23 October 2019.

ANNEXES

Annex I – Overcrowding



Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.

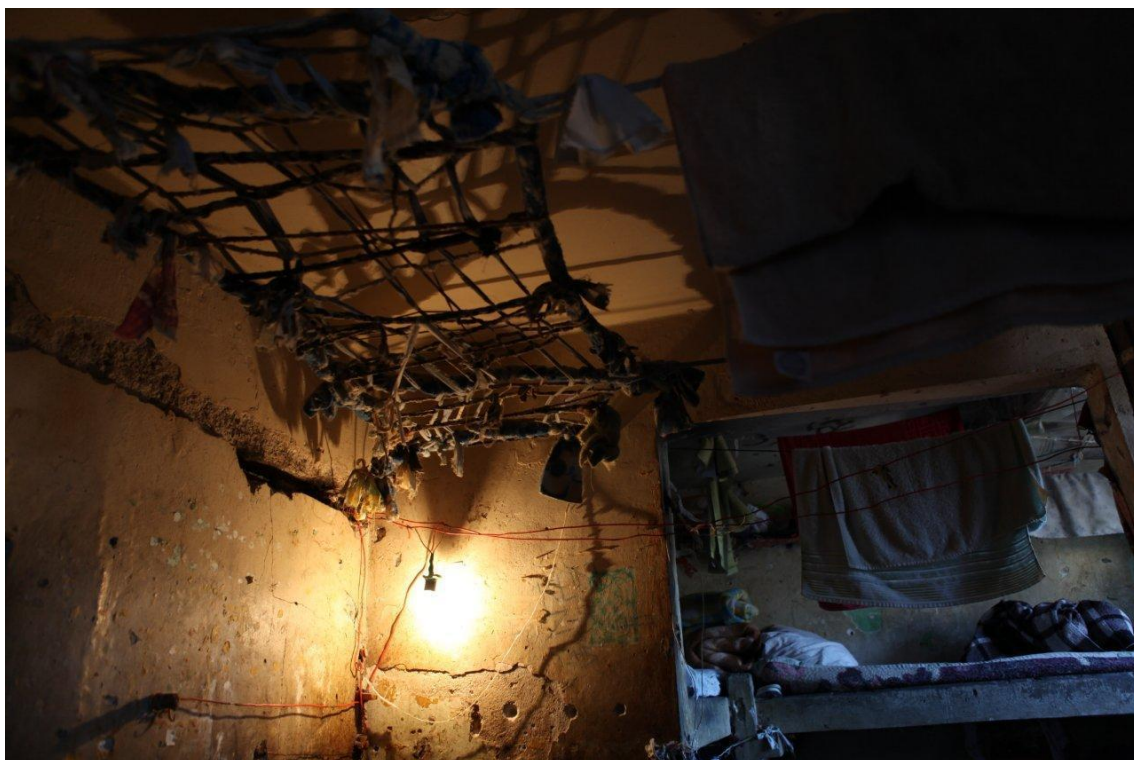


Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.

Annex II – Cells and Hanging beds

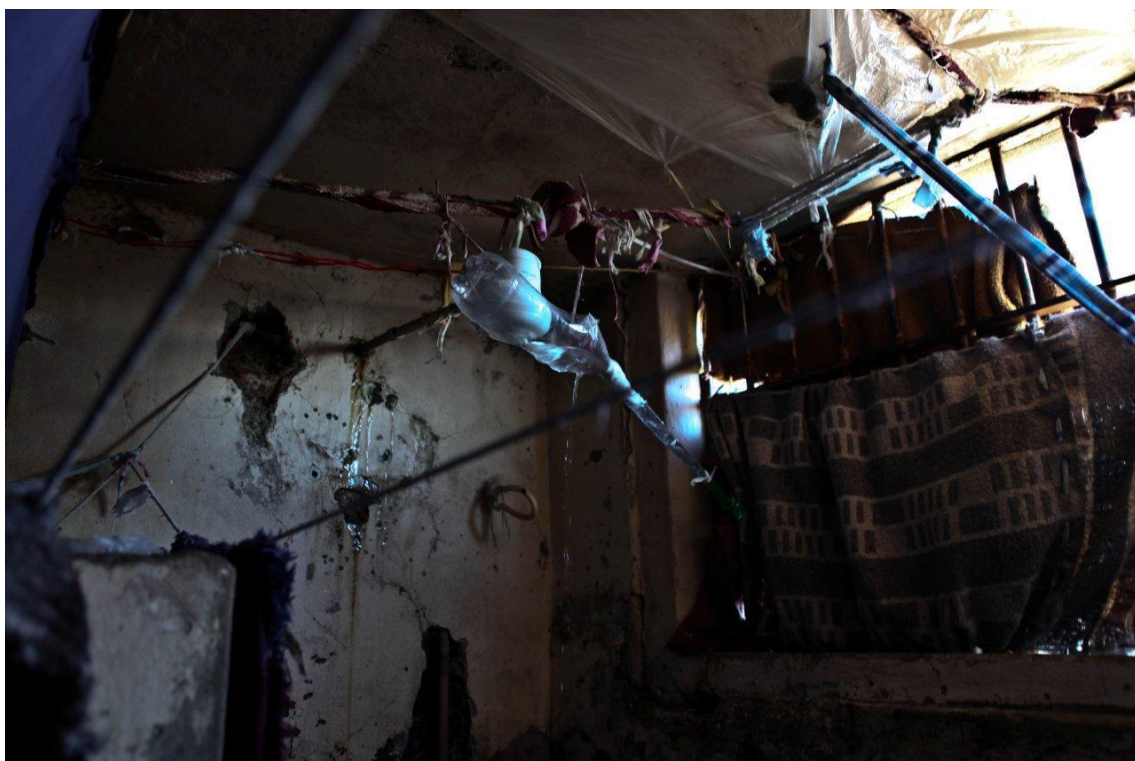


Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.



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Annex III – Improvised hoses and sanitary facilities



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Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.

Annex IV – Sewage flowing on the patio



Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.



Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.

Annex V – Sewage on the patio on a visiting day

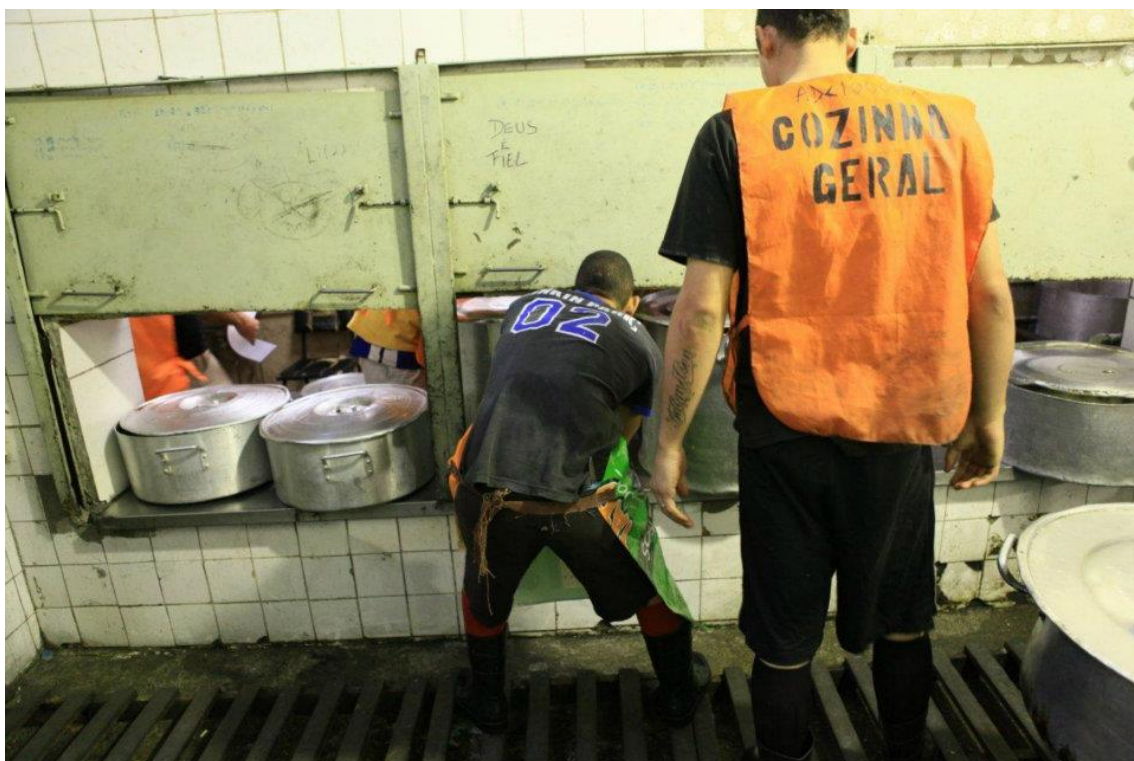


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Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.

Annex VI – Kitchen



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Annex VII – Improvised electrical system and electric stoves



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Picture by Sidinei Brzuska, available at <https://www.facebook.com/sidinei.brzuska>.